88-1290

No. ———

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID R. BENJAMIN, PHILIP C. BOURDETTE, MIRIAM R. BOURDETTE, CECILIA JASON DEDERICH, DAN L. GARRETT, JR., ELIZABETH MISSAKIAN, SYBIL SCHIFF, STEVEN SIMON, and DAN SORKIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, contrary to the holding of the Court of Appeals for the Tenth Circuit in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), the government may employ Fed. R. Crim. P. 6(e)(3)(C)(i) to secure the disclosure of grand jury materials to a private consultant assisting the prosecutor in a grand jury investigation.

2. Whether the government's deliberate concealment of material facts from a district court in order to obtain a disclosure order pursuant to Fed. R. Crim. P. 6(e)(3)(C)(i) to assist its investigation undermines the "structural protections" of the grand jury, warranting dismissal of an indictment without a specific showing of prejudice.

3. Whether, once it has been established that a prosecutor has committed misconduct potentially affecting the grand jury's decision to indict, a reviewing court may nevertheless exempt such misconduct from "customary harmless error inquiry," which requires a court to review the record of the grand jury proceedings before finding the misconduct to be harmless under *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369, 2374 (1988).

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David R. Benjamin, Philip C. Bourdette, Miriam R. Bourdette, Cecilia Jason Dederich, Dan L. Garrett, Jr., Elizabeth Missakian, Sybil Schiff, Steven Simon, and Dan Sorkin petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 852 F.2d 413 and reprinted as Appendix A in the separate appendix to this petition. The Order of the panel explaining its reasons for denying the petition for rehear-

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[1] Pursuant to Sup. Ct. R. 21.1(b), petitioners represent that the foregoing petitioners, together with respondent United States comprise all of the parties to the proceedings from whose judgment petitioners seek review by this Court. *See* n.4, *infra*.

ing and suggestion for rehearing en banc is not reported, and is reprinted as Appendix B in the appendix to this petition. The factual background of the case is set forth in the opinions of the court of appeals denying the government's motions to dismiss the appeal, in *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987), and *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987), which are reprinted as Appendices C and D, respectively. The opinions of the district court denying defendants' motions to dismiss the indictment are not reported and are reprinted as Appendices E and F in the appendix to this petition. The opinion of the district court denying in part defendants' motion for disclosure of grand jury transcripts and minutes is not reported, and is reprinted as Appendix G in the appendix to this petition.

JURISDICTION

The judgment of the court of appeals was entered July 7, 1988. An order denying defendants' petition for rehearing and suggestion for rehearing en banc was entered December 16, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This case involves an interlocutory appeal of motions to dismiss the indictment for misconduct affecting the grand jury. Jurisdiction in the court of appeals was founded on the collateral order doctrine, in light of this Court's decision in *United States v. Mechanik*, 475 U.S. 66 (1986), that certain errors involving the grand jury's charging process are unreviewable after conviction. Pet. App. 32a, 49a.

The Court has granted certiorari in *Midland Asphalt Corp. v. United States*, No. 87-1905 (argued 1/17/89), to decide whether an alleged violation of Rule 6(e), Fed. R. Crim. P., may be immediately appealed under the collateral order doctrine. A decision in *Midland Asphalt* may affect the Court's consideration of the issues presented in this petition.

STATEMENT

This case involves a prosecutor's successful efforts to insinuate into the grand jury process as his witness and "expert consultant," Pet. App. 41a, an individual who was in fact suing six of the nine defendants on the exact allegations that formed the basis for their indictment. The court of appeals found "real merit" to the charges that the prosecutor engaged in misconduct by concealing from the district court and the grand jury the nature of the witness's conflict of interest, Pet. App. 20a, and it acknowledged the risk the witness posed to the fairness of the proceedings. Pet. App. 7a.

The court declined to dismiss the indictments, however. Without ever reviewing the witness's grand jury testimony, it nevertheless found that the government's wrongful concealment of the witness's "obvious sources of . . . bias" did not warrant dismissal. Pet. App. 4a. And it refused to follow the decision of the Court of Appeals for the Tenth Circuit in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), holding that Rule 6(e)(3)(C)(i) does not, under any circumstances, permit the disclosure of grand jury materials to a private investigator assisting the government in a grand jury investigation. Pet. App. 10a.

The history of this case falls into four parts: the background; the circumstances surrounding the disclosure of grand jury materials to the government's so-called "expert consultant," Richard Ofshe; the circumstances surrounding Ofshe's testimony before the grand jury; and the proceedings below.

a. Background. Following lengthy proceedings before a federal grand jury in the District of Columbia, defendants were charged on October 1, 1985, in a 22-count indictment alleging conspiracy, concealment of material

facts, obstruction of justice, and perjury. Pet. App. 39a.[2] The indictment centers upon an IRS audit of The Synanon Church ("Synanon") and civil litigation between Synanon and the United States and various private litigants in the courts of California and the District of Columbia. It alleges that the defendants committed perjury and made false statements in order to conceal the destruction and alteration of documents and tape recordings relevant to those matters.

From the outset of this case, defendants were concerned about the role played in the grand jury by Richard Ofshe, who had been identified by the government as a "consultant," but who, at the time of the grand jury investigation, was suing six of the nine defendants. In November, 1983, Ofshe had filed a cross-complaint against defendants Cecilia Jason Dederich, Dan Garrett, Philip Bourdette, Miriam Bourdette, David Benjamin, and Steven Simon. On July 23, 1984, Ofshe amended his cross-complaint to charge that the same defendants systematically destroyed and concealed evidence in his and other lawsuits, "placing in issue the exact allegations that form the basis for" the criminal charges now pending against them. Pet. App. 40a; *see also id.* at 5a, 104a, 159a.

In an effort to learn whether grand jury materials had been improperly disclosed to Ofshe and, if he testified before the grand jury, whether his financial interest in the outcome of the criminal investigation had been concealed, defendants filed a motion in the trial court pursuant to Rule 6(e)(3)(C)(ii), Fed. R. Crim. P., for disclosure of grand jury transcripts. The district court denied the motion in pertinent part. Pet.

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[2] The case was subsequently transferred to the Eastern District of California on defendants' motion pursuant to Rule 21, Fed. R. Crim. P. *United States v. Benjamin*, 623 F. Supp. 1204 (D.D.C. 1985).

App. 133a. In its Order, however, the court revealed that the government had, in fact, shared grand jury material with Ofshe. Because this disclosure was apparently authorized by an order of the District Court for the District of Columbia pursuant to Rule 6(e)(3)(C)(i), the Court concluded that no violation of Rule 6(e) had occurred. Pet. App. 133a-35a.

The information revealed in the Order denying access to the grand jury transcripts raised grave questions about the circumstances of Ofshe's tesitmony before the grand jury, the propriety of the disclosure to Ofshe, and the conduct of the government in procuring it.

b. The Disclosure to Ofshe. Following Ofshe's testimony before the grand jury, *see* 6-7, *infra*, and immediately after Ofshe had amended his civil suit to add claims based upon the alleged destruction of evidence, the government concluded that his assistance was necessary to its investigation because "the federal investigative agency involved in the investigation lacks familiarity with Synanon records and the voices appearing on Synanon tape recordings . . . ." Application for Disclosure Order Pursuant to Rule 6(e)(3)(C)(i) and 6(e)(3)(D), Fed. R. Crim. P. (hereinafter "Application"), at ¶ 2. Pet. App. 96a.[3] The government sought authorization *ex parte* to disclose "documents and tape recordings subpoenaed by the grand jury" to its "expert, Richard J. Ofshe." *Id.* at ¶ 4. On August 2, 1984, the Hon. Aubrey E. Robinson, Chief Judge of the District Court for the District of Columbia, authorized disclosure of "documents and tape recordings obtained by the 84-1 Grand Jury" to Ofshe "for the purpose of assisting the federal grand

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[3] Portions of the Application are reprinted in the district court's order denying defendants' motion to dismiss, at Pet. App. 96a-97a. The Order authorizing disclosure is reprinted at Pet. App. 97a-98a. The district court later denied defendants' motion for disclosure of the remainder of the Application.

jury and the United States Attorney in the investigation." Pet. App. 98a-99a.

Although it was well aware of Ofshe's civil claims against the defendants, the government did not disclose, nor did the district court know at the time it approved the Application, the crucial fact that Ofshe was seeking in excess of $10 million in damages for the same conduct underlying the criminal investigation. Pet. App. 5a, 41a. Instead, the government disingenuously described Ofshe to the court as a "PhD. who has devoted over ten years to the study of Synanon and who is knowledgeable about its records, tape recordings, and the identities and voices of officials. . . ." Pet. App. 134a. The District Court for the District of Columbia thus authorized the disclosure of grand jury materials to Ofshe without any inkling that he was involved in an acrimonious legal battle with the defendants over the very issues into which the grand jury was inquiring, as a result of which he held a direct professional and pecuniary interest in the outcome of the cirminal investigation.

Thereafter, the government made available to Ofshe both the disclosure order itself, which summarized the nature of the investigation and identified the potential targets, as well as "a number of tape recordings created by the Synanon Foundation, Inc., which consisted of tape recordings made during 1977 of the Synanon " 'Morning Court' sessions conducted by the Founder and Chairman of the Board, Charles E. Dederich." Pet. App. 99a. These tape recording are central to the government's case. They are referred to specifically in Count Sixteen of the indictment, (E.R. 44), and, based upon information supplied to the defendants in response to a Motion for a Bill of Particulars, have been identified as the tape recordings containing the voice of Charles E. Dederich referred to in every count of the indictment.

c. Ofshe's Testimony before the Grand Jury. As the Application made clear, prior to the disclosure of grand

jury material, Ofshe had also testified at least once, and perhaps "several times" before the grand jury. Pet. App. 40a n.2. The district court, however, refused defendants' requests to inquire whether Ofshe ever appeared again after the disclosures, or whether the disclosures to Ofshe were in any way related to anticipated further testimony.

The substance of Ofshe's testimony remains a secret. It has never been disclosed to the defendants or reviewed by the district court or the court of appeals. One key fact, however, has never been in dispute: In connection with Ofshe's appearances before the grand jury, the government never disclosed to the grand jurors that he was seeking civil damages from the defendants for the "exact allegations that form the basis for the later indictment against defendants." Pet. App. 40a; *see also id.* at 3a.

d. The Proceedings Below. Based on these facts, defendants filed two motions seeking dismissal of the indictment on three separate grounds. The disclosures to Ofshe warranted dismissal because *first*, Rule 6(e) does not permit disclosure under any circumstances to a private consultant retained part-time by the government to assist its investigation; and, *second*, even if a court had such authority in some circumstances, the government procured the disclosures in this instance by concealing material facts about Ofshe's conflict of interest. This subterfuge vitiated any disclosure order obtained thereby. *Third*, as to Ofshe's testimony, the defendants argued that the prosecutor fundamentally deceived the grand jury by concealing from it Ofshe's obvious bias, thereby impairing defendants' right to indictment by a neutral and independent grand jury.

The district court denied both motions. It declined to follow the holding of the Tenth Circuit in *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), which, if applied to the facts here, would have required dismissal of

the indictment on the ground that Rule 6(e) does not authorize disclosure of grand jury material to private persons for the purpose of assisting a grand jury investigation. Pet. App. 100a-03a. As to the concealment of Ofshe's conflict from the district court and the grand jury, the court concluded that the government was well aware of Ofshe's financial interest in the outcome of the criminal investigation at the time of his testimony, as well as before it filed the Application. Moreover, it found that the prosecutor concealed these facts from the district court and from the grand jury. Nevertheless, because the court concluded that defendants' concerns about Ofshe were "speculative," Pet. App. 107a, and did not "cast[] serious doubts on the credibility of Dr. Ofshe as a witness," Pet. App. 77a, it found that the prosecutor's conduct did not constitute misconduct. Thus, although the court "strongly advise[d] the prosecution that full disclosure to Judge Robinson on the record would have been the far better course," Pet. App. 110a, and admonished "that the Grand Jury should have been informed of Dr. Ofshe's involvement as a civil litigant with Synanon and some of the defendants herein," Pet. App. 77a, it refused to consider the effect of the concealment on the process leading to the indictment of the defendants.

The court of appeals was far more troubled by what it characterized as "the Ofshe situation." Pet. App. 20a.[4]

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[4] The allegations concerning the disclosure of grand jury material to Ofshe were the subject of the appeal in No. 86-1337. The allegations concerning Ofshe's testimony, as well as other instances of prosecutorial misconduct before the grand jury, were the subject of No. 86-1388. Following denial of the government's motions to dismiss the appeals, Pet. App. 32a, 50a, the Court of Appeals consolidated the cases for the purpose of addressing the merits of defendants' claims. *See* Pet. App. 1a.

Because the government conceded before the district court that Mrs. Schiff may have been called before the grand jury for an improper purpose, Pet. App. 63a, the court reserved ruling on Mrs. Schiff's motion to dismiss for prosecutorial misconduct. Accordingly, Mrs. Schiff was not a party to No. 86-1388 and does not, therefore, join in raising the third question presented.

It found "real merit" to defendants' claim that the "prosecutor's failure to disclose Ofshe's source of potential bias was a breach of duty to the grand jury and the district court." Pet. App. 20a. And it concluded that "[u]nder slightly different circumstances, this lapse could have compromised the government's Rule 6(e) disclosure motion as well." *Ibid.* However, while it readily found misconduct, it, too, refused to dismiss the indictment.[5]

To begin with, the Court refused to follow the Tenth Circuit's lead in *Tager*. Recognizing the relevance of the holding in that case, the Court nevertheless "hesitate[d] to adopt *Tager's* reasoning that" Rule 6(e)(3)(C)(i) does not confer discretion on the district court "to order the disclosure of grand jury materials to private parties aiding the government's investigation." Pet. App 10a.

The court of appeals likewise refused to hold that the government's concealment of facts from the district court warranted dismissal. Pet. App. 11a. The court found that Ofshe had "an interest in influencing the grand jury" that the government concealed from the district court, even though this fact was central to the court's exercise of discretion under Rule 6(e)(3)(C)(i). *Ibid.* On these facts, the court of appeals did not

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[5] The findings of misconduct by the court of appeals were by no means limited to the specific instances identified here. To the contrary, the court used this case as an occasion to warn "that our tolerance of excessive prosecutorial zeal in grand jury proceedings is [not] unlimited." Pet. App. 13a. It characterized as "far from exemplary" the prosecutor's conduct in repeatedly requiring potential defendants to assert their Fifth Amendment privilege before the grand jury, but concluded that dismissal was not required because the misbehavior "alone, does not rise to the level of flagrant prosecutorial misconduct requiring dismissal of the indictments." Pet. App. 13a. In addition, the court found several improprieties in the prosecutor's conduct towards persons appearing before the grand jury that "could have a subtle and indirect influence on the grand jury's impartiality." Pet. App. 17a.

hesitate to find that the prosecutor had engaged in misconduct. *Ibid.* Nevertheless, because the court of appeals believed that the district court would have authorized the disclosure even if it had been fully informed, it concluded that the appropriate remedy for the government's misconduct was limited to "an order foreclosing Ofshe's use of the grand jury materials." *Ibid.*[6]

Finally, the Court of Appeals rejected the district court's conclusion that Ofshe's potential bias did not constitute "evidence casting serious doubts" on his credibility as a witness. Pet. App. 3a. Instead, the court found that the prosecutor breached his duty to the grand jury by failing to disclose "such obvious sources of witness bias as a witness's involvement in a multi-million dollar lawsuit against defendants." *Ibid.*; *see also id.* at 20a ("The prosecutor's failure to disclose Ofshe's source of potential bias was a breach of duty to the grand jury and the district court.").

Like the district court, however, the court of appeals did not have Ofshe's testimony before it, nor would it permit the defendants to review the testimony under Fed. R. Crim. P. 6(e)(3)(C)ii). Pet. App. 19a-20a. The

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[6] The Court of Appeals viewed this as a close question, noting that "[u]nder slightly different circumstances," the disclosure order would have been compromised. Pet. App. 20a. The panel concluded that there was overwhelming proof of "particularized need" for disclosure because it believed Ofshe was "uniquely able to identify the taped voices of Synanon members . . . ." Pet. App. 10a. The question of whether Ofshe's assistance was necessary, much less unique, was neither briefed nor argued in the district court or the court of appeals. In fact, the record on appeal reflects that by the time the disclosure order for Ofshe was obtained, the government had largely secured the cooperation of at least two former residents of Synanon. *See* Pet. App. 90a-92a, 98a-99a, 126a, 169a; C.R. 111, Exhibits A & B (designated for the record by the government on February 19, 1987). Either of these individuals would have been in a far better position than Ofshe to identify the voices of Synanon residents, without posing the same risks to the grand jury.

court thus wholly failed to weigh the effect of Ofshe's testimony on the grand jury's decision to indict these defendants. Rather, relying on its prior decision in *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979), it found that "the breach of the prosecutor's duty in this regard, alone, [does not] necessarily require[] dismissal of the indictment." Pet. App. 4a.

In assessing the misconduct, the court of appeals relied upon the standard set forth in *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987), which imposes upon a defendant challenging an indictment "the burden of demonstrating that the prosecutor engaged in flagrant misconduct that deceived the grand jury or significantly impaired its ability to exercise independent judgment." Pet. App. 2a-3a. A few days before the decision at issue here, however, this Court decided *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988), which articulated a new standard for determining when a court's supervisory power should be exercised to dismiss indictments for prosecutorial misconduct affecting the grand jury. In light of *Bank of Nova Scotia*, on July 21, 1988, defendants petitioned for rehearing and suggested the appropriateness of rehearing en banc. Defendants pointed out that the new standard requires a reviewing court to assess whether the instances of misconduct influenced the grand jury's decision to indict, thus differing in critical respects from the old standard, which questioned whether the misconduct was "flagrant" or whether the grand jury's independence had been undermined. Just as important, the Court in *Bank of Nova Scotia* applied its new standard through "customary harmless error inquiry," 108 S. Ct. at 2374. In every other context in which it has been applied, harmless error analysis has required review of the entire record before an error may be deemed harmless. Because the district court and the court of appeals had not even seen the testimony related to the most serious misconduct, much less considered the effect of this misconduct on the

proceedings as a whole, or given the defendants any opportunity to demonstrate that the error was not harmless, defendants urged the court to remand the case to the district court for the fact-finding required before harmless error review could proceed under the *Bank of Nova Scotia* standard.

On December 19, the panel entered an order denying rehearing and rejecting the suggestion for rehearing en banc. Pet. App. 22a. In its order, the panel recognized that the decision in *Bank of Nova Scotia* changed the standard for evaluating charges of prosecutorial misconduct. It also acknowledged that application of the new standard may compel dismissal in instances where its former standard would not. *Ibid.* Nevertheless, because the panel concluded, without further review of the record, that the *Bank of Nova Scotia* standard "would not lead to a different result" in this case, it denied the petition for rehearing. *Ibid.*

REASONS FOR GRANTING THE WRIT

This case presents important questions about the steps courts must take to guarantee the fairness of grand jury proceedings in the face of prosecutorial misconduct posing a significant risk to the grand jury's independence. The court of appeals recognized both the fact of prosecutorial misconduct and the risk of prejudice to the defendants. Nevertheless, it concluded that it lacked the obligation either to limit Ofshe's involvement in the grand jury process or to scrutinize his impact on the decision to indict once his participation had been surreptitiously accomplished. This result, repugnant in equal measures to the rules governing the grand jury and the principles of harmless error analysis, merits review for several reasons.

The decision of the court of appeals marks the first time that any court has extended Fed. R. Crim. P. 6(e)(3)(C)(i) to authorize disclosure of grand jury mate-

rials to private investigators assisting the government. With this holding, the court of appeals has upended the painstaking compromise through which Congress responded to the government's need for outside investigative help in the grand jury by limiting disclosures such as the one in this case to "government personnel." *See* Rule 6(e)(3)(A)(ii), Fed. R. Crim. P. The result, squarely in conflict with the decision of the Tenth Circuit in *United States v. Tager*, *supra*, has grave consequences for the integrity of the grand jury process.

Quite apart from whether the district court had a right to authorize disclosure of grand jury materials to Ofshe, the manner in which the disclosure was procured in this case was unconscionable. Grand jury secrecy depends, in no small measure, upon the ability of the district courts to exercise discretion over the disclosure of grand jury materials through proceedings that are typically conducted *ex parte*. If, as the court of appeals suggests, the only consequence of a deliberate concealment of material facts from a court considering such disclosure is that an appellate court may later review the propriety *vel non* of the disclosure, then the protections that Rule 6(e) affords to defendants are a dead letter.

The accumulation of prosecutorial misconduct here, though unpalatable in its own right, would be far less disturbing if there were any assurance that the grand jury's deliberations were untainted. The court of appeals, however, was unwilling to undertake the scrutiny that recent decisions of this Court appear plainly to require. In *Bank of Nova Scotia*, this Court indicated that the lower courts were to employ "customary harmless error inquiry" in assessing claims of misconduct before the grand jury. *Bank of Nova Scotia v. United States*, *supra*, 108 S. Ct. at 2374-75; *see United States v. Mechanik*, 465 U.S. 66, 78 (1986) (O'Connor, J., concurring). A "harmless error" review, as this Court has

"consistently made clear," makes it the "duty of a reviewing court to consider the trial record as a whole . . ." and "requires a review of the entire record." *United States v. Lane*, 474 U.S. 438, 445, 448 n.11 (1986). Here, neither the district court nor the court of appeals ever saw the testimony of the witness whose "obvious sources of witness bias" the prosecutor wrongfully concealed from the grand jury, much less considered "the relation of the error asserted to casting the balance for decision on the case as a whole. . . ." *Kotteakos v. United States*, 328 U.S. 750, 762 (1946). This case thus squarely presents the question of whether the Court intends for these same rules to apply to allegations of grand jury misconduct.

I. Rule 6(e)(3)(C)(i) Does Not Authorize Disclosure of Grand Jury Materials to a Part-Time Investigator Assisting the Government.

The general rule of secrecy embodied in Rule 6(e) is the codification of the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States v. Procter & Gamble* Co., 356 U.S. 677, 681 (1958). This rule of secrecy is not to be breached "except where there is a compelling necessity." *Id.* at 682. The paramount importance of the rule to the proper functioning of the judicial system has led this Court steadfastly to refuse to infer authorization of disclosure under Rule 6(e) in the absence of express congressional intent or clear statutory language. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983); *Illinois v. Abbott & Assoc., Inc.*, 460 U.S. 557, 572-73 (1983).

Disclosure of grand jury materials by the government is permitted only in two narrow circumstances: *first*, to government attorneys or such "government personnel" as are "necessary" to assist government attorneys in enforcing federal criminal law, Rule 6(e)(3)(A)(i) and (ii), and, *second*, "when so directed by a court preliminarily

to or in connection with a judicial proceeding," Rule 6 (e) (3) (C) (i). Neither exception is available to permit the government to use outside part-time consultants to supplement federal investigative agencies.

The precise issue raised by the government's conduct here was addressed by the Court of Appeals for the Tenth Circuit in *United States v. Tager, supra.* There, the court reversed a conviction where the government, pursuant to a court order issued under Rule 6(e) (3) (C) (i), had shared grand jury materials with a private individual assisting its investigation.[7] In *Tager*, an employee of the Insurance Crime Prevention Institute, an organization funded by insurance companies to investigate possible fraud, had developed information that formed the basis for a grand jury investigation. Seeking to rely further on the investigator's expertise, the government obtained from the district court a disclosure order under Rule 6(e) (3) (C) (i). *Id.* at 168.

The Tenth Circuit did not question either the need of the government for the investigator's expertise or the willingness of the investigator to comply in good faith with a secrecy order. It held that Rule 6(e) provided no basis on which to authorize the disclosure of grand jury materials to a private consultant to assist the government in its investigation.

Carefully reviewing the structure of Rule 6 and the available avenues for disclosure, the *Tager* court noted first that the exception provided by subsection (A) (ii), which allows disclosure to government personnel as necessary to "assist an attorney for the government in the performance of such attorney's duty to enforce federal

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[7] On remand, the district court granted the defendant's motion to dismiss for violation of Rule 6(e). *See* Order of Dismissal, *United States v. Tager*, No. 78-20052-01 (D. Kan. February 23, 1982).

criminal law," is clearly limited by its terms to "government personnel." *Id.* at 170. As the court correctly determined, "the drafters of (A)(ii) considered whether the assistance of private persons like [the insurance investigator] should be included. They decided against such inclusion by limiting (A)(ii) to 'government personnel.'" *Id.*, citing *Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 5864 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 92 (1977); S. Rep. No. 354, 95th Cong., 1st Sess. 5-6, *reprinted in* U.S. Code Cong. & Admin. News 527, 528-30 (1977).

Having found subsection (A)(ii) to be inapplicable to the case before it, the *Tager* court then turned to subsection (C)(i), which governs disclosure under court order "preliminarily to or in connection with a judicial proceeding." It concluded that this subsection of Rule 6 was likewise unavailable under the circumstances of that case. This exception to the rule of secrecy was intended, the court found, to provide authorization for release of grand jury material typically for use in *other* judicial proceedings, not for use before the very grand jury from which disclosure is sought. *Id.* at 169-70.

The court of appeals did not rest its holding there, however. Noting that "some courts have authorized disclosures" under subsection (C)(i) for use in connection with the grand jury for which the request was made, the *Tager* court focused narrowly on the relationship between subsection (C)(i), the general disclosure provision, and subsection (A)(ii), which by its terms governs disclosure in order to assist the government in an ongoing investigation. *Ibid.* Carefully reviewing the legislative history of the two subsections, the court concluded that, whatever the reach of subsection (C)(i) in the typical case, the "need for assistance in federal investigations . . . was not a matter within [its] contemplation." *Ibid.* Disclosures for that narrow purpose are governed by sub-

section (A)(ii), which does not authorize disclosures to government consultants.

Permitting the government to use subsection (C)(i) to augment its investigative resources would turn the careful structure of Rule 6(e) on its head. Subsection (A)(ii) was passed only after extended and bitter debate. *See* S. Rep. No. 354, 95th Cong., 1st Sess. 5-6, *reprinted in* 1977 U.S. Code Cong. & Admin. News 527, 528-30. It reflects Congress's painstaking balance of the government's need for investigative assistance in the grand jury against the interests of grand jury secrecy. Congress concluded that prosecutors could draw assistance only from "government personnel" in their investigations. This exception, the subject of many court decisions and narrow congressional expansion, would become virtually meaningless if subsection (C)(i) were read to authorize the same disclosures and countless others during the course of a grand jury investigation.[8] Recognizing the absurdity of effectively swallowing up (A)(ii) by a boundless interpretation of (C)(i), the *Tager* court concluded that whatever the breadth of subsection (C)(i) for other purposes, it could not be expanded to address an asserted need to supplement the government's investigative resources.

Conceding the relevance of *Tager* to the facts at issue here, the court of appeals nonetheless "hesitate[d] to adopt *Tager*'s reasoning that subsection (e)(3)(A)(ii) *precludes* resort to private investigative help." Pet. App. 10a (emphasis in original). Without explanation, the court concluded "[i]nstead, we read subsection (e)(3)(C)(i) as giving discretion to the district court to order the disclosure of grand jury materials to private parties

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[8] Such a result, moreover, totally disregards "the principle that gives precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern . . . ." *Simpson v. United States*, 435 U.S. 6, 15 (1978).

aiding the government's investigation." *Ibid.* Although the court's reasoning is opaque, its conclusion suffers from a number of evident flaws.

In the first place, the court's holding is founded on the premise that subsection (C)(i) constitutes an expansive grant of authority to district courts permitting disclosure of secret grand jury material in circumstances otherwise expressly prohibited by Rule 6(e). Nothing could be further from the truth. This Court has steadfastly refused to infer authorizations for disclosure in the absence of express congressional intent or clear statutory language. As the Court put it most recently, subsection (C)(i) contains "an affirmative limitation on the availability" of disclosures, and "reflects a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy." *United States v. Baggot*, 463 U.S. 476, 479-80 (1983). Rather, "the rule is so important, and so deeply-rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so." *Illinois v. Abbot & Associates*, *supra*, 460 U.S. at 572-73. *Accord United States v. Sells Engineering, Inc.*, *supra*, 463 U.S. at 425.

As we have already discussed, and as the court of appeals made clear in *Tager*, the only relevant evidence of congressional intent is a clear expression, through the enactment of the compromise embodied in subsection (A)(ii), to limit the class of persons to whom a prosecutor may turn for investigative assistance. This Court made the same point in *Sells* when attempting the comparable task of reconciling subsection (A)(i) with subsection (A)(ii). According to *Sells*, subsection (A)(ii) addressed a need identical to that perceived by the lower courts in this case: "Justice Department attorneys found that they often needed active assistance from outside personnel—not only investigators from the Federal Bureau of Investigation, IRS, and other law enforcement agencies,

but also accountants, handwriting experts, and other persons with special skills." 463 U.S. at 436. As the Court emphasized in reviewing the complicated legislative history producing subsection (A)(ii), the resulting provision represented a careful accommodation between the need to provide investigative assistance to prosecutors and the equally compelling interest in preventing the unauthorized use of grand jury information. 463 U.S. at 441-42. That provision, expanding grand jury access only to "government personnel," clearly forecloses the contrary result the court of appeals reached here.

The court of appeals also placed substantial emphasis on its belief that the Tenth Circuit's decision in *United States v. Anderson*, 778 F.2d 602, 605 (10th Cir. 1985), "narrows and discredits *Tager* to the point that it is doubtful authority even in its own circuit." Pet. App. 9a. That conclusion simply lacks foundation. Like the similar decision of the Ninth Circuit in *United States v. Mayes*, 670 F.2d 126 (9th Cir. 1982), on which the court of appeals also relied, *Anderson* permitted the disclosure of grand jury materials to an expert witness during the course of his testimony. *United States v. Anderson*, *supra*, 778 F.2d at 605.

Such disclosures share little in common with the one in *Tager* or in this case. Permitting an expert witness to review grand jury material before or during his testimony does not upset the unambiguous congressional limitation on outside investigative help reflected in subsection (A)(ii). In *Mayes* and *Anderson*, the disclosures were limited to what was necessary for the expert's testimony. The ability of the expert to influence the grand jury was carefully circumscribed and subject to later judicial review of the grand jury transcripts. By contrast, although the court of appeals found that Ofshe's private interests "would be served by damaging the defendants' reputations" and that he "ha[d] an interest in influencing the grand jury," Pet. App. 7a, the disclosures to him—un-

bounded by the purposeful limitations otherwise imposed on "expert" witnesses—had an unquestioned and unconfinable potential to subvert the grand jury process. Like the prosecutor, but unlike a witness, the role of an investigator "contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record." *Young v. United States ex rel. Vuitton et fils S.A.* 481 U.S. 787, 107 S. Ct. 2124, 2140 (1987) (emphasis in original). Far from discrediting *Tager*, in short, the decision of the Tenth Circuit in *Anderson* does no more than to acknowledge the fundamental differences between the role of a witness and that of an investigator.

Moreover, it is important to emphasize that *Tager* does not constrain the government from obtaining advice or other assistance from whatever source it feels is appropriate, even for investigative purposes, so long as secret grand jury information is not revealed. Congress has made the determination, in subsection (A)(ii), that the only true "experts" in the field of investigating and enforcing criminal laws are the government personnel charged with that responsibility. And only those public officials, bound by a public trust of impartiality, should be allowed to penetrate the shield of secrecy surrounding the grand jury room.

The wisdom of that conclusion is brought forcefully home by the facts of this case. Had Ofshe been a government employee, otherwise entitled to review grand jury materials without prior court approval under subsection (A)(ii), his participation in the grand jury investigation while pursuing civil damages against its targets would have been absolutely prohibited under the Department of Justice's own conflict of interest regulations, and might well have exposed him to criminal penalties. *See* 18 U.S.C. § 208 (punishing personal and substantial participation by government employee in matter in which he has a financial interest); *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*, 107 S. Ct. at 2136; *United*

States v. Heldt, 668 F.2d 1238, 1275 (D.C. Cir.), *cert. denied*, 456 U.S. 926 (1981).[9] It is inconceivable that Congress intended to confer discretion on the district courts to authorize private parties assisting the government to engage in conduct that would be criminal if undertaken by government personnel.

The only remaining question is what sanction is appropriate for the violation that occurred here. In strikingly similar circumstances, this Court has recently invoked its supervisory authority to impose a "categorical rule" requiring the reversal of convictions obtained by a prosecutor burdened by a conflict of interest. *Young v. United States ex rel. Vuitton et Fils S.A.*, *supra*, 107 S. Ct. at 2141. In that case, the district court had appointed as prosecutor in a criminal contempt action a lawyer who was simultaneously representing the private party victimized by the contempt. 107 S. Ct. at 2129. Drawing on the fact that this Court has "always been sensitive to the possibility that important actors in the criminal justice system may be influenced by factors that threaten to compromise the performance of their duty," the Court held the appointment to be improper. 107 S. Ct. at 2139. Equally important, for present purposes, the Court concluded that "[h]armless error analysis is not equal to the task" of addressing the error. 107 S. Ct. at 2141.

In eschewing a harmless error inquiry, the Court relied on two critical factors. In the first place, the Court found the use of harmless error analysis in commen-

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[9] 28 C.F.R. § 45.735-4 (1988) prohibits a Justice Department employee from participating in a criminal investigation if he has a personal relationship with "[a]ny person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution." 28 C.F.R. § 45.735-5 (1988) prohibits participation by any employee in a matter in which he has a financial interest unless the Deputy Attorney General certifies on the basis of a written finding that the interest is insubstantial.

surate with the magnitude of the potential harm: "A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system." 107 S. Ct. at 2140. Equally important, the Court found that, even if it wished to undertake a search of the record for evidence of prejudice, "[h]armless error analysis is not equal to the task . . . ." *id.* at 2141, since the wide-ranging responsibilities and discretion of the prosecutor "call[] into question, and therefore require[] scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." *Id.* at 2140.

Investigators are no less "important actors in the criminal justice system." 107 S. Ct. at 2139. The disclosures by the government to Ofshe were not, and were never intended to be, a one-way street. They were sought not for some purpose independent of the grand jury's deliberations, but precisely because the government contended that Ofshe's help was essential to persuading the grand jury to return an indictment. Significantly, the nature of Ofshe's alleged expertise and the subject matter of his "assistance" to the government and to the grand jury were hardly incidental to the grand jury's deliberations. Contrary to the implication of the court of appeals that Ofshe's role was limited to voice identification, Pet. App. 10a, the prosecutor represented in the Application that Ofshe was needed because he was also familiar with "Synanon records." Pet. App. 96a. In this role, Ofshe enjoyed considerable latitude—and, as the court of appeals found, certainly possessed a motive—to influence and to mislead the grand jury, particularly since both the grand jury's investigation and Ofshe's civil suit revolved around the alleged destruction of the very "Synanon records" with which Ofshe—but not the federal investigative agency—was allegedly familiar. Pet. App. 40a. Ofshe's potential impact on the course of the grand jury investigation, the selection of targets, and the shape of

the indictment was at once profound and impossible to discern from the record of grand jury transcripts and minutes.

Three times in the past six years, this Court has explored the limits of disclosures permitted to the government under Rule 6(e). *See United States v. Doe*, 481 U.S. 102 (1987); *United States v. Sells Engineering, Inc., supra*; *Illinois v. Abbott & Assoc., Inc., supra*. Together, these cases reflect the singular importance this Court attaches to Rule 6(e), as well as the vexing problems posed in balancing the government's need for access to grand jury materials against the interests of grand jury secrecy. This case presents an issue of statutory construction fully as important as those recently addressed by the Court. More than any other case about the scope of Rule 6(e)—in this Court or elsewhere—however, the issue presented here raises questions lying at the heart of the fairness and of the integrity of the grand jury process. It fully merits this Court's review.

II. The Prosecutor's Concealment of Material Facts from the District Court Undermined the "Structural Protections" of the Grand Jury, Warranting Dismissal Without a Specific Showing of Prejudice.

Bank of Nova Scotia v. United States, supra, limited the courts' supervisory power to dismiss indictments for misconduct before the grand jury to circumstances where there is evidence that misconduct "did substantially influence [the decision to indict], or if there is grave doubt that the decision to indict was free from such substantial influence." 108 S. Ct. at 2378. Despite its emphasis on the need to demonstrate prejudice, however, the Court was careful to exempt from harmless error scrutiny certain "fundamental" misconduct "in which indictments are dismissed, without a particular assessment of the prejudicial impact of the errors in each case. . . ." 108 S. Ct. at 2375. The Court explained that where the alleged misconduct compromises the "structural protections"

afforded by the grand jury, a "presumption of prejudice" is warranted. *Ibid.* In these instances, dismissal is called for without a showing that the misconduct affected in some specific fashion the grand jury's decision to indict. *Ibid.*

Although the court of appeals found that, in his efforts to secure the disclosure of grand jury materials to Ofshe, the prosecutor breached his duty to the court by concealing Ofshe's "obvious sources of witness bias," Pet. App. 4a, the panel failed to consider whether this concealment undermined the grand jury's "structural protections." Instead, it limited its analysis to the hypothetical question of whether the supervising judge might have authorized disclosure had the relevant facts not been concealed. Pet. App. 10a, 11a. The focus of the court of appeals, however, misapprehends both the nature of the court's responsibility to safeguard grand jury secrecy and the purpose of the government's concealment of key facts from the district court.

This Court has "consistently construed [Rule 6(e)] . . . to require a strong showing of particularized need for grand jury materials before any disclosure will be permitted." *United States v. Sells Engineering, Inc., supra,* 463 U.S. at 443. That standard, in turn, requires the district court to weigh carefully the need for disclosure against the risks of violating grand jury secrecy. *See United States v. Procter & Gamble Company, supra.* Because most applications for disclosure in circumstances such as these are conducted *ex parte,* see Rule 6(e)(3)(D), Fed. R. Crim. P., it is axiomatic that the ability of the district courts to fulfill their statutory function depends almost entirely upon the good faith of government prosecutors.

As the court of appeals recognized, good faith was in short supply here. By focusing myopically on the narrow question of how the district judge would have exercised his discretion if he had been provided with a candid ac-

counting of the "Ofshe situation," however, the court of appeals overlooked the fact that the government's deliberate misconduct left him with no discretion to exercise. It is hard to conceive of misconduct more "fundamental" or aimed more precisely at the "structural protections" afforded by the grand jury. Unless this Court intends to restrict the class of "structural" errors to instances of invidious discrimination in the selection of grand jurors, *see Bank of Nova Scotia v. United States*, *supra*, 108 S. Ct. at 2375, a limitation without support in logic or previous decisions of this Court, the government's misconduct in this case should be treated as it was doubtless intended: a deliberate effort to undermine the structural protections of the grand jury process.[10]

III. "Customary Harmless Error Inquiry" Requires Review of the Entire Record Before Potentially Prejudicial Grand Jury Misconduct May Be Deemed Harmless.

As the Court in *Bank of Nova Scotia* took pains to point out, the "customary harmless error inquiry" that it intended to apply to most misconduct affecting the grand jury is not a novel concept, but involves rather a method of review commonly applied to other statutory and constitutional violations of the rights of defendants. *Bank of Nova Scotia v. United States*, *supra*, 108 S. Ct. at 2374; *see United States v. Mechanik*, *supra*, 465 U.S. at 78. By definition, a harmless error inquiry focuses not on the magnitude of the error, but its effect, with its object "to substitute judgment for automatic application of rules." *Kotteakos v. United States*, *supra*, 328 U.S.

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[10] In this respect, the suggestion by the court of appeals that the appropriate remedy should instead be a further order restricting Ofshe's use of grand jury materials in other proceedings, Pet. App. 11a, misses the point. As the record clearly reflects, the government's misconduct was motivated by a desire to involve Ofshe in the workings of the grand jury that indicted these defendants, not to confer upon him an unfair advantage in his civil action.

at 760. Without exception, the cases emphasize that once error is found, "only the most painstaking and thorough review of an entire trial record can justify a conclusion that its standard has, or has not, been met." *United States v. Lane, supra,* 106 S. Ct. at 746 (Stevens, J., dissenting in part); *see id.* at 730 & n.11. *Accord Rose v. Clark,* 478 U.S. 570, 583 (1986); *United States v. Hasting,* 461 U.S. 499, 509 n.7 (1983); *Chapman v. California,* 386 U.S. 18, 23-24 (1967); *Kotteakos v. United States, supra,* 328 U.S. at 760-65.

With its decision in this case, the court of appeals has suggested that different ground rules apply to errors affecting the ground jury. Here, the court held unequivocally that the prosecutor engaged in misconduct by concealing Ofshe's "obvious" source of bias that had a conceded, but unexplored potential to influence improperly the grand jury's decision to indict. Pet. App. 4a, 7a. To this day, however, not only the substance of Ofshe's testimony, but even the number of times he appeared as a witness before the grand jury remains a secret. Pet. App. 40a n.2. Neither the court of appeals nor the district court ever even reviewed his testimony, much less considered "the relation of the error asserted to casting the balance for decision on the case as a whole . . . ." *Kotteakos v. United States, supra,* 328 U.S. at 762.

Were an error of similar magnitude to arise at trial, the well-settled rules governing harmless error analysis would, at a minimum, require an appellate court to review the testimony of the witness and to assess the effect of the error in light of the evidence at trial and the issues in dispute. The utter failure of the courts below to conduct even the most cursory review of the record in this case falls particularly short. What is particularly troubling about this result, however, and the reason it merits review by this Court, is the court of appeals' conclusion that, in the context of grand jury misconduct, it

is free to exempt from the harmless error inquiry certain categories of potentially prejudicial errors. Thus, in finding the error here to be harmless, the court of appeals concluded simply that this *type* of misconduct was not sufficiently serious—without regard to its possible effect —to justify dismissal. Pet. App. 4a, 20a.

The court of appeals' categorical approach to assessing grand jury misconduct finds no support in *Bank of Nova Scotia* itself. There, the Court not only set a *standard* for evaluating claims of grand jury misconduct—requiring substantial influence on the decision to indict as a threshold for dismissal—but also defined the *manner* in which such a review was to be conducted—namely, "customary harmless error inquiry." In coupling its new standard to the familiar rules of harmless error analysis, the Court reiterated that a harmless error determination can occur only after "examining the record as a whole." *Bank of Nova Scotia v. United States*, 108 S. Ct. at 2374-75. Justice O'Connor made the same point by example in her concurrence in *United States v. Mechanik*, which this Court adopted in *Bank of Nova Scotia* as the appropriate standard for resolving claims of grand jury misconduct. 108 S. Ct. at 2374. In that case, Justice O'Connor found the tandem appearance of two agents before the grand jury, in violation of Fed. R. Crim P. 6(d) to be harmless on the strength of the district court's "scrupulous examination of the record," which included not only the testimony of the witnesses themselves, but the other evidence before the grand jury relating to the same subject matter. 475 U.S. at 78.

More fundamentally, an approach directed to the magnitude of the error, rather than to its harmful effect, is inimical to the very concept of harmless error analysis. With a few, well-defined exceptions, this Court has consistently resisted efforts to dilute the harmless error standard through arbitrary, qualitative classifications of errors. *See United States v. Lane*, *supra*, 106 S. Ct. at

732; *United States v. Hasting, supra*, 461 U.S. at 509; *Chapman v. California, supra*, 386 U.S. at 826-27. Thus, most recently in *United States v. Lane*, in the context of extending harmless error review to violations of Rule 8(b), Fed. R. Crim. P., the Court explicitly rejected the concept that violations of "substantial rights" are inherently prejudicial under Rule 52(a), Fed. R. Crim. P. 474 U.S. at 445-46, 448 n.11. According to the Court, the qualitative classification of certain rights as "substantial" "begs the question raised by Rule 52(a). Assuming there is a 'substantial right,' the inquiry remains whether the error 'affects substantial rights' requiring reversal of a conviction. That kind of inquiry requires a review of the entire record." 474 U.S. at 448 n.11.

The approach taken by the court of appeals may hold a particular attraction for courts called upon to review claims of misconduct before the grand jury. Unlike the review of a trial record, the review of errors affecting the grand jury necessarily entails scrutiny of transcripts and other documents protected by the Fed. R. Crim. P. 6(e) and the policies of grand jury secrecy. It is likewise true that requiring the district court to review the entire grand jury transcript every time misconduct is alleged would impose an intolerable burden on the lower courts, which will often be unfamiliar with what went on before the grand jury.[11]

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[11] From the defendant's perspective, faithful application of harmless error principles in the grand jury context will inevitably call for consideration of the standard for disclosure of grand jury transcripts under Fed. R. Crim. P. 6(e)(3)(C)(ii) in cases such as this one. Whether the burden of proving or rebutting prejudice under *Bank of Nova Scotia* falls in the first instance on the defendants or on the government, where specific instances of misconduct are found, the defendants cannot conceivably establish that they have been prejudiced, or rebut claims that the errors are harmless, without access to the same materials that the court must evaluate in order to make its determination. Recognition of this fact would mitigate the particular unfairness of the result here, in

We do not read the harmless error doctrine generally, or *Bank of Nova Scotia* in particular, to impose such burdens, however. Review of the entire grand jury record is not called for every time misconduct is merely alleged; only in cases such as this one, where potentially prejudicial misconduct is established, does the harmless error doctrine come into play. At the same time, we also do not mean to deprecate the importance of these concerns or to minimize the particular difficulties that adapting the doctrine of harmles error to the grand jury setting may pose. *Bank of Nova Scotia* was this Court's first word on the subject, but, as the court of appeals' struggle to apply that holding makes clear, it should by no means be its last. This case, which squarely raises the question of how to weigh the effect of undisputed instances of misconduct on the decision to indict, presents an appropriate occasion for further review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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which defendants were denied access to the very materials they needed to establish prejudice under *Bank of Nova Scotia*, as well as considerably diminish the burden of review on the courts.

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88-1290

Supreme Court, U.S.
FILED
FEB 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DAVID R. BENJAMIN, PHILIP C. BOURDETTE, MIRIAM R. BOURDETTE, CECILIA JASON DEDERICH, DAN L. GARRETT, JR., ELIZABETH MISSAKIAN, SYBIL SCHIFF, STEVEN SIMON, and DAN SORKIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 86-1337, 86-1388

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID R. BENJAMIN; PHILIP C. BOURDETTE; MIRIAM R. BOURDETTE; CECILIA JASON DEDERICH; DAN L. GARRETT, JR.; ELIZABETH MISSAKIAN; SYBIL SCHIFF; STEVEN SIMON; DAN SORKIN;
Defendants-Appellants.

Argued and Submitted March 15, 1988

Decided July 7, 1988

Appeal from the United States District Court
for the Eastern District of California

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Before KOELSCH, SCHROEDER and FLETCHER, Circuit Judges.

FLETCHER, Circuit Judge:

Benjamin and several co-defendants, members of Synanon, have been indicted for obstruction of justice and conspiracy to obstruct justice, in connection with the alleged destruction of documents pertaining to various civil and criminal proceedings. Defendants appeal the district court's denial of their motions to dismiss the indictments. We affirm.

A motions panel of this court has held the district court's order to be an appealable collateral order. *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987); *United States v. Dederich*, 825 F.2d 1317 (9th Cir. 1987). These opinions set forth the factual background of the case.

DISCUSSION

This court reviews de novo a district court's determination as to whether a prosecutor's alleged misconduct before a grand jury warrants dismissal of the indictment. *United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986).

Although courts have the power to dismiss indictments either on due process grounds, or under their inherent supervisory power over the administration of justice, that power is exercised sparingly. *United States v. Busher*, 817 F.2d 1409, 1411 (9th Cir. 1987). A defendant challenging an indictment has the burden of demonstrating that the prosecutor engaged in flagrant misconduct that

deceived the grand jury or significantly impaired its ability to exercise independent judgment. *Id.*

The leading case in this circuit showing circumstances justifying dismissal is *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). There, the prosecutor's presentation of the transcript testimony of a witness of dubious credibility was combined with the prosecutor's unduly rushing the grand jury decision, improper and prejudicial transcript testimony from the defendant, and testimony from only one live witness, a DEA agent, that was "laden with conclusions concerning the guilt of several defendants, [and] summarized the DEA's investigations, much of which he had not been involved with personally." 607 F.2d at 879, 881. The court concluded that the cumulative effect of these "errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury." *Id.* at 884. In light of *Samango* we view the alleged errors by themselves and cumulatively.

I. *Witness Bias*

The prosecutor presented Dr. Richard Ofshe to the grand jury as a witness. Ofshe, a University of California (Berkeley) sociologist, has "devoted ten years to the study of Synanon." The prosecutor never disclosed to the grand jury that Ofshe, at the time of his testimony, was involved in civil litigation with Synanon in which he was asserting multi-million dollar claims, and which involved some of the same issues of destruction of evidence as were involved in the criminal case. The district court, while acknowledging that "the Grand Jury should have been informed of Dr. Ofshe's involvement as a civil litigant with Synanon and some of the defendants herein," nevertheless held that "Dr. Ofshe's potential bias does not constitute evidence casting serious doubts on the credibility of Dr. Ofshe as a witness."

The prosecutor has no duty to present to the grand jury all matters bearing on witness credibility. *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir. 1983); *Jack v. United States*, 409 F.2d 522, 524 (9th Cir. 1969). Nevertheless, the prosecutor is not entitled to deprive the grand jury of its opportunity to evaluate witness credibility. *See United States v. Samango*, 607 F.2d at 884.

In *Samango*, this court affirmed the dismissal of a superseding indictment that had been obtained, in part, by the prosecutor's reliance on transcript testimony of a highly dubious witness. The court of appeals stated that the prosecutor should have presented live testimony from this witness to enable the grand jury to determine the witness's credibility. 607 F.2d at 882. "[T]he prosecutor knew but did not warn the grand jury of [the witness's] dubious credibility, nor apparently did he apprise them that they could subpoena his live testimony." *Id.* at 881.

The defendants here argue that, under *Samango*, the indictments should be dismissed for the prosecutors' failure to apprise the grand jury of Ofshe's potential bias. Clearly, the prosecutor should have disclosed such obvious sources of witness bias as a witness's involvement in a multi-million dollar lawsuit against defendants. However, *Samango* does not support the proposition that the breach of the prosecutor's duty in this regard, alone, necessarily requires dismissal of the indictment. In *Samango*, the failure to disclose witness credibility problems was only one of several errors, "*none of which alone might have been enough to tip the scales*" justifying the extreme sanction of dismissal. (Emphasis added.) *Id.* at 884.

II. *Rule 6(e) Violation*

Defendants also challenge the denial of their motion to dismiss the indictment for alleged improper disclosure of grand jury materials to third parties, in violation of Fed. R. Crim. P. 6(e).

A. *Background*

Following Dr. Ofshe's testimony before the grand jury, the government decided to use Ofshe to aid its investigation because "the federal investigative agency involved in the investigation lack[ed] familiarity with Synanon records and the voices appearing on Synanon tape recordings." The government obtained from Judge Robinson [1] an order pursuant to Rules 6(e)(3)(C)(i) and 6(e)(3)(D) to disclose various tape recordings to Ofshe as an "expert" who could assist in the investigation. The government did not inform Judge Robinson of Ofshe's involvement in litigation against Synanon. Specifically, Ofshe had filed a cross-complaint against defendants Dederich, Bourdette, Benjamin, Simon and Dan Garrett for intentional infliction of emotional distress, malicious prosecution and harassment; he had recently amended the cross-complaint to charge defendants with destruction of evidence, which is also the basis for the criminal charges. Defendants argue that the disclosure was improper because it was not authorized under Rule 6(e); and that, even if it was authorized, it was obtained by means of misrepresentation and concealment by the government, and therefore improper. Defendants argue that dismissal of the indictment is the proper remedy.

Judge Robinson, in approving the disclosure order, concluded (and the government argues here) that the materials were not "matters occurring before the grand jury" within the meaning of Rule 6(e), because "they did not reveal the strategy and direction of the grand jury investigation."

If Rule 6(e) applies, the district court has discretion to order disclosure of materials, and this court reviews the order for an abuse of discretion. *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 228, 99 S.Ct. 1667,

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[1] District of Columbia District Court, presiding before the case was moved to the Northern District of California.

1677, 60 L.Ed.2d 156 (1979). However, the district court's determination of whether matters are ones "occurring before the grand jury," such that Rule 6(e) applies, is a mixed question of law and fact which we review *de novo*.

B. *Whether Rule 6(e) applies*

The cases seem to agree that the touchstone of the Rule 6(e)'s applicability is whether the disclosed materials would "elucidate the inner workings of the grand jury." *Senate of Puerto Rico v. U.S. Dept. of Justice*, 823 F.2d 574, 583 (D.C. Cir. 1987) (quoting *Fund for Constitutional Gov't. v. National Archives*, 656 F.2d 856, 870 (D.C. Cir. 1981)). However, doubt exists as to whether subpoenaed documents created for purposes unrelated to the grand jury constitute "matters occurring before the grand jury." *Compare Senate of Puerto Rico*, 823 F.2d at 584 (mere fact that material was presented to grand jury does not automatically establish that it would reveal grand jury's inner workings); *SEC v. Dresser*, 628 F.2d 1368, 1382-83 (D.C. Cir. 1980) (same); *United States v. Lartey*, 716 F.2d 955, 964 (2d Cir. 1983) (documents not cloaked in secrecy merely because they are presented to grand jury), *with National Archives*, 656 F.2d at 869 (scope of secrecy encompasses documents which would reveal "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors, and the like"); *Tager & Buffone v. U.S. Dept. of Justice*, 590 F. Supp. 1012, 1015 (D.D.C. 1984) (same); *Greenspun v. C.I.R.*, 622 F. Supp. 551, 555 (D.D.C. 1985) (information revealing what documents were placed before the grand jury covered by secrecy provisions).

To resolve this issue, we find it helpful to examine the interests underlying grand jury secrecy and Rule 6(e). In *Douglas Oil*, 441 U.S. at 219, 99 S.Ct. at 1673, the

court noted the need: (1) to protect witnesses' willingness to come forward and testify fully and frankly; (2) to reduce the risk of flight by grand jury targets; (3) to assure that persons accused are not damaged in their reputations. Also it is important (4) to protect the grand jury from outside interference. *United States v. Lartey*, 716 F.2d 955, 964 (2d Cir. 1983). If any of the policies underlying grand jury secrecy may be adversely affected by a disclosure, Rule 6(e) should apply. *See id.* at 963-64.

In the instant case, Ofshe's involvement in the lawsuit against Synanon implicates the third and fourth rationales of grand jury secrecy: his interests in this lawsuit would be served by damaging the defendants' reputations, and he, accordingly, has an interest in influencing the grand jury. Thus the tapes in this case should be considered "matters occuring before the grand jury."

C. *Rule 6(e)(3)(C)(i)*

Defendants, relying on *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), argue that the district court was without authority to order the disclosure of grand jury materials to Ofshe and that, consequently, the indictment must be dismissed.[2] In *Tager*, the government obtained the defendant's indictment for mail and wire fraud based largely on the investigative work initiated by an investigator employed by a consortium of insurance companies. After developing sufficient evidence to turn over to the government, the private investigator continued to assist the government's investigation, to which end he was given access to certain grand jury

[2] Defendants state, that the *Tager* court "ordered dismissal of the indictment." In actuality, *Tager* reversed the defendant's conviction and "remanded for further proceedings consistent with" the opinion, but contained no discussion of the appropriate remedy. 638 F.2d at 168, 171. On remand, the district court dismissed the indictment.

materials made available under Rule 6(e)(3)(C)(i). This rule allows disclosure of grand jury materials, as an exception to the general rule of secrecy, "when so directed by a court preliminarily to or in connection with a judicial proceeding."

The *Tager* court held that the district court was not authorized by this provision to order the disclosure. First, citing the legislative history of Rule 6(e), the court reasoned that it is subsection (e)(3)(A)(ii), and not (e)(3)(C)(i), that governs disclosures to assisting investigators. Subsection (A)(ii), which allows disclosure to "such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist . . . [in the enforcement of] federal criminal law," apparently reflected the conscious choice of its drafters to limit such investigatory disclosures to "government personnel" and exclude private investigators. 638 F.2d at 170.

Second, the *Tager* court reasoned that subsection (C)(i) was "not designed nor has it been used in the past as a source of authority for a court to order disclosure to assist with the present grand jury proceedings." *Id.* The court interpreted the phrase in subsection (e)(3)(C)(i), "preliminarily to or in connection with a judicial proceeding" as excluding the grand jury proceeding at issue: "To apply this provision to the very grand jury from which disclosure is sought seems somewhat illogical." 638 F.2d at 170 (quoting *In re Miami Federal Grand Jury No. 79-8*, 478 F. Supp. 490, 493 (S.D. Fla. 1979)).

However, *Tager* is not the only word on this subject. In *United States v. Mayes*, 670 F.2d 126 (9th Cir. 1982), this court held that disclosure of certain grand jury materials to an expert witness before the grand jury was permissible under Rule 6(e)(3)(C)(i). The court interpreted the phrase "preliminarily . . . to a judicial pro-

ceeding" to include the ongoing grand jury proceeding at issue. 670 F.2d at 129; *accord United States v. Stanford*, 589 F.2d 285, 292 (7th Cir. 1978). The court distinguished *Tager*, "without expressing a view as to [*Tager*'s] correctness," by noting that the expert witness in *Mayes* was not asked to assist an ongoing investigation, but to express his expert medical opinion on evidence previously presented to the grand jury. 670 F.2d at 129 n.2. The government could have instead "familiarized [the expert witness] with the facts surrounding the child's death by posing a complex hypothetical . . . [, but] this approach would have been unduly cumbersome." *Id.* at 129. In any event, the law in this circuit, contrary to *Tager*, is that subsection (e)(3)(C)(i) applies to the current grand jury proceeding.

Tager has been eroded by a subsequent case from its own circuit. In *United States v. Anderson*, 778 F.2d 602, 605 (10th Cir. 1985), an "expert" grand jury witness was shown grand jury materials, and he commented on them at the grand jury's request. The Tenth Circuit reversed a district court ruling that that procedure violated Rule 6(e). The court distinguished *Tager* on the ground that *Tager* involved "a nontestifying investigator [who] was not in any sense in the employ of the government, and the prosecution, not the grand jury, made the request for disclosure." 778 F.2d at 605 n.1.

Anderson narrows and discredits *Tager* to the point that it is doubtful authority even in its own circuit. It is difficult to see what difference it makes, for Rule 6(e) purposes, whether the "investigator" or "expert" testifies or not: the breach of secrecy and ability to influence grand jury evidence are very similar.[3] The fact that the grand jury asked for the disclosure in *Anderson* is particularly problematic, since that fact arguably takes the

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[3] It also seems irrelevant whether or not Ofshe, like the *Anderson* witness, was paid by the government.

disclosure out of (e)(3)(A)(ii), which provides only for disclosure requests by the prosecutor. If (e)(3)(A)(ii) is inapplicable, the only possible applicable subsection would be (e)(3)(C)(i). Significantly, *Anderson* relies on no particular subsection of Rule 6(e), so as to avoid either rewriting section (e)(3)(A)(ii) or expressly overruling *Tager*.

If *Tager* has any vitality at all after *Mayes* and *Anderson*, its effect in this case would be to bar disclosures to private investigators or non-expert witnesses. Ofshe apparently did not testify regarding the tapes, and even if he had, he was not an "expert" but rather a percipient witness who could identify the taped voices. Thus, he is more like a private investigator than an expert. We hesitate to adopt *Tager*'s reasoning that subsection (e)(3)(A)(ii) *precludes* resort to private investigative help. Instead, we read subsection (e)(3)(C)(i) as giving discretion to the district court to order the disclosure of grand jury materials to private parties aiding the government's investigation. However, such disclosures under Rule 6(e)(3)(C)(i) can only be ordered by the court on "a strong showing of particularized need" that must be weighed against the interests in grand jury secrecy. *United States v. Sells Engineering Inc.*, 463 U.S. 418, 443, 103 S.Ct. 3133, 3148, 77 L.Ed.2d 743 (1983). In this case, because Ofshe was uniquely able to identify the taped voices of Synanon members, the district court cannot be said to have abused its discretion in finding the requisite "particularized need" to order disclosure under subsection (e)(3)(C)(i).

D. *Government Misconduct*

Defendants argue that, even if the Rule 6(e) disclosure order was facially proper, the order was "vitiated" by the government's concealment of Ofshe's private interest in the outcome of the investigation.

As noted above, Ofshe's involvement in civil litigation against defendants arguably implicates the policies underlying grand jury secrecy. Therefore, that information could have been relevant to the district court's exercise of discretion, which calls upon the court to weigh the government's need to disclose against the risks of violating grand jury secrecy. *See Sells Engineering*, 463 U.S. at 443, 103 S.Ct. at 3148. Had the court been apprised about Ofshe, it might also have tailored its disclosure order to restrict Ofshe's misuse of the grand jury materials. However, given the order's general prohibition against Ofshe's disclosure of the materials to others and the strong showing of particularized need for Ofshe's assistance, we do not consider dismissal of the indictment to be the appropriate remedy in this case. It would be more appropriate for the district court to issue an order foreclosing Ofshe's use of the grand jury materials.

III. *Fifth Amendment Harassment*

Defendants assert that the prosecutor engaged in a systematic pattern of calling and questioning witnesses who had stated their intention to assert the fifth amendment, solely for the purpose of prejudicing the grand jury.

The grand jury transcripts show the following. Philip C. Bourdette claimed the privilege not to answer 17 of 34 questions, pertaining to his address, various Synanon connections, and destruction of documents. The government asked him, document by document, whether he would produce subpoenaed documents, to which Bourdette responded by asserting the privilege.[4] Cecilia Jason

[4] A substantial percentage of questions which witnesses refused to answer dealt with the witnesses' intentions to produce corporate documents. While the document-by-document questioning might resemble "harassment," those questions may have been justified by the prosecutor's need to make a record to challenge the assertions of privilege. It is well established that the privilege against self

Dederich claimed the privilege not to answer 115 of 168 questions, pertaining to her address, Synanon affiliations, her intentions to furnish documents in compliance with subpoena (accounting for twenty-two pages of colloquy), her knowledge of Synanon activities and destruction of evidence. Sybil Schiff asserted the privilege as to 39 of 53 questions, dealing with Synanon ties and destruction of evidence. Steven Simon asserted the privilege to 31 of 66 questions, dealing with his address, his Synanon connections and destruction of documents. He did answer certain biographical questions, including questions about his two marriages and his divorce.[5] Miriam Bourdette, Elizabeth Missakian and David Benjamin "were called briefly, claimed their Fifth Amendment privileges, and were excused."

Defendants cite no case, nor have we found one, in which an indictment was dismissed because the U.S. attorney had improperly compelled the witness to invoke, even repeatedly, the fifth amendment privilege.[6] In general, the fifth amendment does not prohibit calling poten-

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incrimination is personal and does not extend to corporate documents. *Bellis v. United States*, 417 U.S. 85, 88, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974).

[5] Apparently, witnesses were routinely questioned about marital status because many of them had asserted marital privilege at prior proceedings.

[6] *United States v. Coppola*, 479 F.2d 1153 (10th Cir. 1973), cited by defendants in their reply brief, is inapposite. There, the court reversed a conviction where a witness was called *at trial* even though the prosecutor knew he would assert the privilege. The prosecutor asked twenty questions which the witness refused to answer and which implied the witness's knowledge of facts which he really did not know. Defendants here do not make this contention about the grand jury questions. Moreover, the concerns animating appellate scrutiny of evidentiary rulings at trial, where the issues are honed to a determination of guilt or innocence, differ from those governing judicial review of prosecutorial conduct before the grand jury.

tial defendants or "targets" before the grand jury, notwithstanding the likelihood that the witness will assert the privilege against self incrimination. *See United States v. Friedman*, 445 F.2d 1076, 1088 (9th Cir. 1971); *United States v. Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968). Nor is it prosecutorial misconduct to "test the validity of the defendants' reliance on their constitutional right to remain silent." *United States v. Wolfson*, 405 F.2d 779, 784-85 (2d Cir. 1968).

We find that the prosecutor's questioning of the witnesses, so as to cause them repeatedly to assert the fifth amendment privilege, alone, does not rise to the level of flagrant prosecutorial misconduct requiring dismissal of the indictments. *See United States v. Duff*, 529 F. Supp. 148, 155 (N.D. Ill. 1981) (dismissal not warranted where prosecutor caused defendant to invoke privilege fifty-five times and questioned good faith of defendant's reliance on fifth amendment before grand jury). It is true that the prosecutor's conduct here was far from exemplary. We do not suggest that our tolerance of excessive prosecutorial zeal in grand jury proceedings is unlimited. We go only so far as to say that the record does not show that the prosecutor harangued the witnesses or improperly commented on their assertions of privilege,[7] nor do defendants contend that the questions placed unfounded allegations before the grand jury. *Cf. United States v. Serubo*, 604 F.2d 807, 814-16 (3d Cir. 1979).

The district court found that the alleged "privilege harassment" was not improper, because all of the wit-

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[7] Courts have recommended, but not required, that the prosecutor instruct the grand jury to draw no adverse inferences from assertions of privilege; all that is required is a *Miranda*-type warning. *See, e.g., Friedman*, 445 F.2d at 1088; *Duff*, 529 F.Supp. at 155. Here, the prosecutor Mirandized the witnesses, but gave no cautionary instructions to the grand jury. Where, as here, the prosecutor repeatedly elicited assertions of privilege, some cautionary instructions would have been appropriate.

nesses but one were asked either to provide handwriting samples, to produce documents, or to answer non-incriminating questions. This may support the legitimacy of calling the witnesses, but it is not dispositive. The district court appears to have relied upon *United States v. Horowitz*, 452 F. Supp. 415 (S.D.N.Y. 1978). In *Horowitz*, the court held that questioning defendant "concerning his knowledge of the events under investigation while aware that [defendant] intended to assert his privilege was not improper . . . even were the government previously informed that the privilege would be claimed, unless [defendant] were called *solely for the purpose of displaying his claim of privilege to the grand jury.*" *Id.* at 418 (emphasis added). In making this "sole purpose" qualification, the *Horowitz* court cited *Fortunato*, 402 F.2d at 82; however, *Fortunato* does not support that proposition, and we decline to adopt the rule created in *Horowitz*.[8]

The rationale for this "sole purpose" rule is presumably to prohibit prosecutors from questioning witnesses in bad faith to elicit prejudicial assertions of the privilege. However, it would be easy enough for prosecutors to avoid a finding that eliciting such responses was the sole purpose of calling a witness: the prosecutor could call for some token production of physical evidence, or ask some token questions that the witness could answer. Thus, if bad faith is the touchstone of impropriety, *cf. United States v. Basurto*, 497 F.2d 781, 786 (9th Cir. 1974) (prosecutor has duty of good faith to Court, grand jury and defendant), the prosecutor's ability to show an

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[8] The same judge, a year earlier in *United States* v. *Goldman*, 439 F.Supp. 337, 348-49 (S.D.N.Y. 1977), noted that a prosecutor's question to a grand jury target was improper where the question, on its face, assumed that the witness would assert the privilege. However, the court found a lack of prejudice because the defendant was indicted by a different grand jury. It is difficult to reconcile the "impropriety" of the question in *Goldman* with the "propriety" of the questions in *Horowitz*.

additional purpose for calling the witness should not necessarily be dispositive, if the prosecutor's main purpose is to harass the witness. Conversely, if the prosecutor has a legitimate purpose in calling and questioning witnesses knowing they will assert the privilege *see e.g.*, *Wolfson*, 405 F.2d at 784-85 (legitimate to "test" witness's reliance on privilege), then it is difficult to see why the prosecutor should be required to show other reasons for calling the witness.

Defendants assertion that these instances together revealed a "systematic pattern" of misconduct adds little to their argument.[9] If it is not improper to cause a lone defendant to assert the privilege, knowing in advance that he will do so, we do not see why the same treatment would be improper directed at multiple defendants (in a conspiracy or other case). Defendants offer no legal theory or authority to suggest otherwise.

IV. *Interference with Grand Jury Impartiality*

The prosecutor has an obligation not to infringe upon the independent judgment of the grand jury. *See, e.g.*, *United States v. McClintock*, 748 F.2d 1278, 1285 (9th Cir. 1984). The defendants argue that the prosecutor violated this obligation by asking the defendants prejudicial and irrelevant questions, and making belittling or derogatory remarks and gestures.

The first alleged incident involved David Benjamin. During a break in the proceedings, Benjamin, who was acting as his own attorney, approach the prosecutor to ask him a question; the prosecutor "yelled" that Benjamin was a target so that the prosecutor could not speak to him, causing several listening grand jurors to laugh. This

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[9] Defendants' contentions regarding witnesses Ronald Cook and Chris Reynolds boil down to the same general claim that it is improper knowingly to make grand jury witnesses assert the privilege.

incident, though reflecting adversely on the prosecutor's professional demeanor does not rise to the level of misconduct described in *United States v. Kilpatrick*, 575 F. Supp. 325, 333 (D. Colo. 1983) (defendant's expert witness, a University of Washington tax law professor, was "browbeaten" by government attorney, who told witness that his testimony was a disgrace and intimated that Tax Division would complain to witness's law school). Moreover, the prosecutor's conduct did not convey an impression of Benjamin's guilt, beyond the fact already known to the grand jury, that Benjamin was a target. *See United States v. Cederquist*, 641 F.2d 1347, 1359 (9th Cir. 1981) (dismissal of indictment not justified where prosecutor's conduct conveys his belief that indictment is warranted).

Defendants also assert that in questioning Dennis Speert, then president of Synanon, the prosecutor repeatedly expressed disbelief when Speert denied knowing the answers to certain questions. Defendants also claim the prosecutor asked Speert to investigate certain matters and report back, but would not let Speert take notes on what those matters were. The prosecutor also allegedly repeatedly insisted to Yvett Van Dalsem, a clerk in Synanon's law office, that she answer questions regarding document production "yes" or "no"; when she asserted privilege on one occasion, he made exasperated gestures; the grand jurors laughed on one occasion when she left the room to consult with her attorney; and after her testimony, she was ordered to return five days later, disrupting her plan to return home to California from Washington, D.C.

The district court, after in camera review of the transcripts, rejected the defendants contentions concerning Speert and Van Dalsem, as based on inaccurate or exaggregated allegations. We do not have these portions of the transcript before us. But even if we take the allegations as true, they do not rise to the level of serious mis-

conduct. The exasperated gesture in response to Van Dalsem's assertion of privilege does not amount to "flagrant or abusive conduct" justifying dismissal of the indictment. *United States v. Pabian*, 704 F.2d 1533, 1539-40 (11th Cir. 1983) (three or four spontaneous gestures of exasperation, not in conjunction with harassing or improper questions, not flagrant or abusive).

If their description is accurate, the expressions of disbelief in response to Speert's denials of knowledge attributed to the prosecutor certainly were unseemly. However, this conduct is not the same as impugning a witness for asserting the privilege, does not constitute a direct attack on Speert's credibility and does not make false insinuations or create inferences that would not have been apparent to the grand jury, which knew Speert was president of Synanon.

The other allegations, dealing with actions by the prosecutor that added to the unpleasantness of the experience for these witnesses, show a certain amount of disrespect that could have a subtle and indirect influence on the grand jury's impartiality. However, indictments have been dismissed only in cases involving direct and unfounded or irrelevant insinuations by the prosecutor of witness wrongdoing or dishonesty. *See United States v. Hogan*, 712 F.2d 757, 761 (2d Cir. 1983) (prosecutor's inflammatory rhetoric to grand jury that defendant was a "hoodlum" plus unfounded allegations of other criminal activity); *United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979) (gratuitous unsupported references to defendant's violent tendencies and purported Mafia associations); *United States v. Roberts*, 481 F. Supp. 1385, 1389 & n.9 (C.D. Cal. 1980) (questions insinuating that witness was getting paid by defendant to testify, coupled with prosecutor's broken promise to supervising judge to provide exculpatory evidence to grand jury).

Finally defendants charge that a colloquy between the prosecutor and Ronald Cook, in which the prosecutor's

question insinuated that Cook was present at "the beating of individuals" at a Synanon facility, was improper. Defendants rely on *United States v. Serubo*, 604 F.2d 807, 815-16 (3d Cir. 1979), in which the prosecutor's conduct, found "improper, reprehensible and unacceptable," by the court, included the following colloquy between the prosecutor and a witness (not the defendant in that case):

> Q. Have you ever heard the name Frank Sindone?
>
> A. No.
>
> Q. Do you know Frank Sindone is probably the number three man of the Philadelphia Cosa Nostra?
>
> A. No.
>
> Q. Do you know Frank Sindone was tried for loan sharking in 1971? [He was acquitted.]
>
> A. No.
>
> Q. Do you know that during the course of his loan-sharking case there were tapes played in open Court that he stated that in referring to someone that owed him money, a woman, he was going to take a hatchet and slice her head in two; that is on tape. Do you know that was said in open Court?

Id. at 815. We find *Serubo* distinguishable from this case. In *Serubo* the government conceded that it had failed to lay any evidentiary foundation for its attempt to link the defendant to organized crime; further, the prosecutor failed to reveal to the grand jury that the defendant had been acquitted of loansharking. In this case, there is no allegation that the insinuation is untrue or misleading. More importantly, the insinuations against Cook could not have prejudiced Cook in the same way the insinuations in *Serubo* prejudiced that defendant, because Cook was testifying under a grant of immunity. Finally, the court in *Serubo* remanded, threatening dismissal of the indictment as a sanction to deter "entrenched and flagrant," as opposed to isolated, mis-

conduct of that sort by prosecutors. *Id.* at 817. We do not find that the prosecutor's conduct here, if it is misconduct, justifies dismissal.

V. *Abuse of Subpoena Authority*

Defendants argue that the prosecutor issued certain grand jury subpoenas for the improper purpose of preventing disclosure of those documents to the defendants. According to defendants, the prosecutor's subpoena of documents in June and September 1983, prior to the empaneling in October of the particular grand jury which investigated the charges leading to this indictment, raises an inference of such an impropriety. This vague allegation appears to lack legal and factual support. There is nothing in the record to suggest that the prosecutor abused the grand jury's subpoena authority. *See United States v. Kleen Laundry & Cleaners*, 381 F. Supp. 519, 523 (E.D.N.Y. 1974).

VI. *Evidentiary Hearing and Disclosure of Transcripts*

An evidentiary hearing is required on a motion to dismiss an indictment if defendants raise a material issue of fact which, if resolved in accordance with defendants' contentions, would entitle them to relief. *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980). There were factual disputes as to whether certain witnesses had communicated to the prosecutor, prior to their appearing before the grand jury, their intention to assert the privilege. There were also disputes as to whether the prosecutor had harassed certain witnesses by gestures that would not appear in the record. However, no evidentiary hearing was or is necessary, because dismissal would not be warranted even if defendants' versions of the facts were true.

We also reject the defendants' claim that the district court abused its discretion by refusing to disclose grand jury transcripts to the defendants under Rule 6(e)(3)

(C)(ii). A defendant has no right to pre-trial discovery of grand jury transcripts absent a particularized need. *United States v. Ferreboeuf*, 632 F.2d 832, 835 (9th Cir. 1980); *Lancey v. United States*, 356 F.2d 407, 412-13 (9th Cir. 1966). No such need exists, in light of our resolution of the above issues.

CONCLUSION

We have found real merit only to one of the several contentions raised by defendants. The prosecutor's failure to disclose Ofshe's source of potential bias was a breach of duty to the grand jury and the district court. Under slightly different circumstances, this lapse could have compromised the government's Rule 6(e) disclosure motion as well. However, it does not by itself justify dismissal of the indictment. *See Samango*, 607 F.2d at 884. The other alleged conduct either does not rise to the level of misconduct, or else is not sufficiently serious, even taken together with the Ofshe situation, to merit dismissal. *See id.*

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-1337
86-1338

D.C. No. CR-F-86-1-REC

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID R. BENJAMIN; PHILIP C. BOURDETTE; MIRIAM R. BOURDETTE; CECILIA JASON DEDERICH; DAN L. GARRETT, JR.; ELIZABETH MISSAKIAN; SYBIL SCHIFF; STEVEN SIMON; DAN SORKIN,
Defendants-Appellants.

ORDER

[Filed Dec. 19, 1988]

Before: KOELSCH, SCHROEDER and FLETCHER, Circuit Judges.

Appellants have urged this panel to grant a rehearing in this case, Nos. 86-1337 and 86-1388 (July 7, 1988), in light of *Bank of Nova Scotia v. United States*, —— U.S. ——, 108 S.Ct. 2369 (1988), handed down almost concurrently with the filing of this opinion. *Nova Scotia* holds that dismissal of an indictment is appropriate only "'if it is established that the violation substantially in-

fluenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." 108 S.Ct. at 2374, quoting *United States v. Mechanik*, 475 U.S. 66, 78 (1986) (O'Connor, J., concurring). This standard differs from that used in the opinion: "flagrant misconduct that deceived the grand jury or significantly impaired its ability to exercise independent judgment." Slip op. at 8272. These two standards, although similar, in that both require a violation by the prosecutor combined with an effect on the grand jury, are not precisely equivalent. *See* 108 S.Ct. at 2376.

Nevertheless, we conclude that reconsideration under the new standard would not affect the result in this case. In any analysis of the flagrancy of prosecutorial misconduct under our old standard, the likely effect on the grand jury played a crucial role. *See United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979) (prejudice to defendant resulting from bias of grand jury serves as benchmark of misconduct). In this case, we found no deception of the grand jury nor impairment of its independent judgment. A new analysis of the prosecutorial misconduct in this case, directed at its possible "substantial influence" on the grand jury, would not lead to a different result. Although there may be cases where misconduct fails to deceive a grand jury, or to bias it against a defendant, while still exercising a "substantial influence" on its decision to indict, this is not such a case.

The full court has been advised of the suggestion for rehearing en banc and the intent of the panel to file this order, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 86-1387, 86-1388, 87-7052
and 87-7055

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

CECILIA JASON DEDERICH; ELIZABETH A. MISSAKIAN,
Defendants-Appellants.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

DAVID R. BENJAMIN; PHILIP C. BOURDETTE; MIRIAM R. BOURDETTE; CECILIA J. DEDERICH; DAN L. GARRETT, JR.; ELIZABETH MISSAKIAN; STEVEN SIMON; DAN SORKIN,
Defendants-Appellants.

DAVID R. BENJAMIN, MIRIAM R. BOURDETTE, PHILIP C. BOURDETTE, CECILIA JASON DEDERICH, DAN L. GARRETT, JR., ELIZABETH A. MISSAKIAN, STEVEN SIMON AND DAN SORKIN,
Petitioners,
v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES OF AMERICA,
Real Party in Interest.

CECILIA JASON DEDERICH and ELIZABETH MISSAKIAN,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES OF AMERICA,
Real Party in Interest.

Aug. 19, 1987

Appeal from the United States District Court
for the Eastern District of California

Guy L. Goodwin, Washington, D.C., for plaintiff-appellee.

Robert D. Luskin, Washington, D.C., Kenneth W. De Vaney, Fresno, Cal., Thomas J. Nolan, Palo Alto, Cal., Richard Mazer, San Francisco, Cal., Jay W. Powell, Visalia, Cal., Tom Henze, Phoenix, Ariz., Robert N. Harris, Los Angeles, Cal., John L. Williams, San Jose, Cal., and Salvatore Sciandra, Fresno, Cal., for defendants-appellants.

Before CANBY, REINHARDT and THOMPSON, Circuit Judges.

CANBY, Circuit Judge:

ON MOTIONS TO DISMISS
INTERLOCUTORY APPEALS

CONDITIONAL PETITIONS FOR MANDAMUS

Eight defendants appeal the district court's denial of their motions to dismiss an indictment on grounds of prosecutorial misconduct before the grand jury. Two of the defendants, Dederich and Missakian, also separately appeal the district court's denial of their motion to dismiss the indictment for violation of transactional immunity granted by the Superior Court of California. Each of the appeals is accompanied by an alternative, conditional petition for a writ of mandamus. The government moves to dismiss both interlocutory appeals for lack of jurisdiction. We conclude that the district court's denial of dismissal for prosecutorial misconduct is reviewable prior to final judgment under the collateral order doctrine. We agree with the government, however, that we lack jurisdiction over Dederich and Missakian's separate appeal because those claims will remain reviewable on appeal from any conviction. We deny Dederich's and Missakian's petition for writ of mandamus, and dismiss that of all eight defendants as moot.

FACTS

Following lengthy federal grand jury proceedings, defendants were charged on October 21, 1985, in a 22-count indictment.[1] The indictment grew out of an Internal Revenue Service audit of The Synanon Church, and out of civil litigation between Synanon, the United States, and private parties in California State and District of Columbia courts. Defendants are charged with committing perjury and making false statements to conceal the destruction and alteration of documents and tape recordings pertaining to those proceedings.

[1] Defendants were indicted for conspiracy, concealment of material facts, obstruction of justice, and perjury.

All defendants moved to dismiss the indictment on the ground that prosecutorial misconduct undermined the independence and impartiality of the grand jury.[2] Defendants alleged that the prosecutor's misconduct before the grand jury included calling witnesses for the sole purpose of repeatedly forcing them to assert their fifth amendment privilege, harassing Synanon-associated witnesses, failing to present evidence that cast doubt on the credibility of witnesses, making derogatory comments about Synanon and the Synanon lifestyle, presenting irrelevant and false, prejudicial evidence, and abusing the grand jury's subpoena authority. The district court examined grand jury transcripts *in camera.* On December 2, 1986, without holding an evidentiary hearing, the district court denied defendants' motion to dismiss the indictment.[3]

Dederich and Missakian were granted transactional immunity by the Los Angeles County Superior Court, to compel them to testify before a state grand jury. In the district court, they moved to dismiss the indictment. Dederich and Missakian alleged that the federal prosecutor, Mr. Guy Goodwin, instigated and controlled the parallel state and federal grand jury investigations into conduct underlying the federal indictment. Dederich and Missakian contended that because Goodwin's involvement in the state investigation established an agency relationship between federal and state prosecutors, due process bound Goodwin to honor the state prosecutors' promise of transactional immunity. The district court determined that Dederich and Missakian failed to establish agency and denied their motion to dismiss on December 2, 1986.

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[2] Defendants also requested a hearing and renewed their previous motion for disclosure of grand jury transcripts.

[3] The government conceded, however, that one defendant might have been called before the grand jury for an improper purpose. That defendant is not a party to this appeal.

Defendants appeal both of the district court's orders, asserting appellate jurisdiction under 28 U.S.C. § 1291. On January 15, 1987, by separate motions, the government moved to dismiss the appeals. We consider the motions and the conditional petitions for mandamus together because they arise from the same prosecution and involve related legal issues.[4]

APPEALABILITY

I. PROSECUTORIAL MISCONDUCT

The government contends that our decision in *United States v. Garner*, 632 F.2d 758 (9th Cir. 1980), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981), bars interlocutory review of the district court's denial of the motion to dismiss for prosecutorial misconduct.[5] The government further argues that the order is not appealable under the doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). We disagree.

An appealable interlocutory order must meet three requirements under *Cohen's* collateral order doctrine:

> First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the ac-

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[4] This motions panel previously ruled on appealability of two earlier pretrial orders in this prosecution. We first determined that we lacked jurisdiction to review the denial of a motion to dismiss several indictment counts on the basis of the statute of limitations. Nos. 86-1307 & 86-7684. Later, in *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987), we determined that jurisdiction existed under the collateral order doctrine to review the district court's denial of defedants' motion to dismiss the indictment for violation of Fed.R.Crim.P. 6(e) (prohibiting disclosure of grand jury materials).

[5] The government also relies on *United States v. Linton*, 655 F.2d 930 (9th Cir. 1980), a brief *per curiam* decision which relied solely on the authority of *Garner* for its result.

tion"; third, it must "be effectively unreviewable on appeal from a final judgment."

Flanagan v. United States, 465 U.S. 259, 265, 104 S.Ct. 1051, 1055, 79 L.Ed.2d 288 (1984) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978)).

The government contends that this appeal is inseparable from the merits of the action, thereby failing the second requirement. In support of its contention, the government relies on the harmless error rule of *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed. 2d 50 (1986), which "inextricably link[s]" analysis of the grand jury's probable cause determination to the sufficiency of evidence at trial. Government Motion to Dismiss Appeal for Lack of Jurisdiction at 8.

It is true that *Mechanik* requires *post-conviction* analysis of grand jury irregularities to focus on the petit jury's verdict, 106 S.Ct. at 942-43, and *Mechanik* is relevant to this appeal, as discussed below. However, prosecutorial misconduct before the grand jury, examined prior to trial for its effect on the indictment, is not truly related to the merits of the criminal trial. For purposes of the collateral order doctrine's second requirement, it is enough that a decision by this Court on the present appeal will have no effect on the trial court's determination of guilt or innocence under the present or any superseding indictment.

The more critical issue here is whether defendants' present claims will be "effectively unreviewable on appeal from final judgment." *Flanagan*, 465 U.S. at 265, 104 S.Ct. at 1051 (citations omitted). To determine whether appellants' claims meet this third requirement of the collateral order rule, we must decide whether the claims "are sufficiently aimed at the charging process that they fall within the ambit of *Mechanik*." *United States v. Benjamin*, 812 F.2d 548, 553 (9th Cir. 1987). Despite

the government's contention that our review of prosecutorial misconduct must await appeal from final conviction, we have already determined in *Benjamin* that similar grand jury irregularities may well be considered harmless and effectively unreviewable after trial under *Mechanik*. *Id.* at 551-53; *but see United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986) (because allegations went beyond issue of probable cause to "fundamental fairness," claims would escape *Mechanik*'s harmless error analysis in post-conviction appeal).

Appellants' prosecutorial misconduct charges essentially go to improper effect on the grand jury's decision to indict. We think, and the government agrees, that *Mechanik*'s harmless error rule would apply if the claims were reviewed on appeal from final judgment. *Benjamin*, 812 F.2d at 552-53; Government Motion to Dismiss at 7 n.2. Other circuits have also concluded that the Supreme Court's language in *Mechanik* bears broad interpretation. *United States v. Hintzman*, 806 F.2d 840, 843 (8th Cir. 1986); *Porter v. Wainwright*, 805 F.2d 930, 941-42 (11th Cir. 1986); *United States v. Thomas*, 788 F.2d 1250, 1254 (7th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 187, 93 L.Ed.2d 121 (1987); *see United States v. Page*, 808 F.2d 723, 726-27 (10th Cir. 1987); *but cf. Taylor*, 798 F.2d at 1339-40.

Post-conviction review under *Mechanik* would lead us to conclude that the petit jury's verdict "wipe[s] out" any prejudice to defendants resulting from the allegedly erroneous charging decisions. *Benjamin*, 812 F.2d at 553; *see Mechanik*, 106 S.Ct. at 941-43. Therefore, if we do not permit defendants' appeal at this stage, "[e]rrors that affected the grand jury proceedings to the detriment of the acccused, and that would have justified the district court in dismissing the indictment before trial,[6] would

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[6] We have upheld dismissal of indictments based on cumulative prosecutorial errors and indiscretions before the grand jury. *E.g.*,

go wholly unremedied if the district court itself erred in denying dismissal." 812 F.2d at 853-54 (footnote added). Appellants' prosecutorial misconduct claims consequently meet the third requirement of the collateral order rule.[7]

II. GRANT OF IMMUNITY

Dederich and Missakian argue that this court has jurisdiction over their appeal from the district court's pretrial denial of dismissal based on the state grant of transactional immunity from prosecution.

The collateral order exception to the final judgment rule must be applied with "the utmost strictness in criminal cases." *Flanagan*, 465 U.S. at 265, 104 S.Ct. at 1051. As we recently stated in *United States v. Ohnick*, 803 F.2d 1485 (9th Cir. 1986), "[t]he *Cohen* principle is limited to an 'asserted right the practical and legal value of which could be destroyed if it were not [immediately] vindicated.'" *Id.* at 1487 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377, 101 S.Ct. 669, 675, 66 L.Ed.2d 571 (1981) (in turn quoting *United States v. MacDonald*, 435 U.S. 850, 860, 98 S.Ct. 1547, 1552, 56 L.Ed.2d 18 (1978))) (brackets in original). Appellants Dederich and Missakian contend that their immunity is such a right.

United States v. Samango, 607 F.2d 877, 884-85 (9th Cir. 1979); *see also United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974). However, "[a] defendant who challenges the indictment . . . bears a heavy burden to demonstrate that the prosecutor engaged in flagrant misconduct deceiving the grand jury or significantly impairing its exercise of independent, unbiased judgment." *United States v. Venegas*, 800 F.2d 868, 869-70 (9th Cir. 1986) (citations omitted).

[7] The result we reach today and our prior decision in *Benjamin* are consistent with *Garner*, 632 F.2d at 765-66. In fact, *Benjamin* relied on *Garner's* analysis. *Benjamin*, 812 F.2d at 551. The *Benjamin* decision also addressed *Garner's* concern for the disruptive effect of interlocutory appeals on the criminal justice system. *Id.* at 553.

The Supreme Court has permitted a narrow exception to the final judgment rule which allows interlocutory appeals from denials of qualified or absolute immunity to government officials. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). We reject appellants' contention that the jurisdictional question here is governed by *Mitchell* and other governmental immunity cases. This case does not implicate the policy behind that narrow exception, which grows from the necessity of government officials to act expeditiously without having to defend themselves from legal actions.

Appellants also rely on the Second Circuit's suggestion that a plea agreement barring prosecution protects a defendant not merely from punishment, but from trial itself. *United States v. Abbamonte*, 759 F.2d 1065, 1070-71 (2d Cir. 1985) (upholding interlocutory appeal). This court, however, has taken the opposite position. *United States v. Solano*, 605 F.2d 1141, 1142-43 (9th Cir. 1979) (concluding that court of appeals lacked jurisdiction over interlocutory appeal involving plea-bargain immunity). Indeed, the majority of courts have denied interlocutory appeals grounded in plea-bargain promises or grants of immunity. *United States v. Bird*, 709 F.2d 388, 392 (5th Cir. 1983);[8] *United States v. Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); *Solano*, 605 F.2d at 1142-43; *United States v. Cavin*, 553 F.2d 871, 873-74 (4th Cir. 1977) (citing *Heike v. United States*, 217 U.S. 423, 30 S.Ct. 539, 54 L.Ed. 821 (1910)).

While Dederich's and Missakian's immunity was not granted pursuant to a plea agreement, we conclude that

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[8] The promise of "nonprosecution" in *Bird* bears some similarity to the California statute under which immunity was conferred on Dederich and Missakian. *See* Cal.Pen.Code § 1324. The *Bird* court concluded that the promise was one of immunity from punishment, not immunity from any prosecution. *Bird*, 709 F.2d at 392. *See also United States v. Eggert*, 624 F.2d 973 (10th Cir. 1980) (per curiam).

the same policy considerations govern it. The guarantee afforded by the immunity can be adequately protected by appeal after conviction. Their rights will not be irretrievably lost if interlocutory appeal is denied. Theirs is not an "*immunity from suit* rather than a mere defense to liability." *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2816 (emphasis in original).

CONCLUSION

Since any rights Dederich and Missakian may have to transactional immunity can be vindicated on appeal from final judgment, we lack jurisdiction over their interlocutory appeal. The government's motion to dismiss in No. 86-1387 is granted. Because the district court's denial of dismissal may be reviewed by direct appeal, we also deny Dederich and Missakian's conditional petition for writ of mandamus (No. 87-7055). *See, e.g., Schlaugenhauf v. Holder*, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); *Public Utilities Commission v. FERC*, 814 F.2d 560, 562 (9th Cir. 1987); *Bauman v. District Court*, 557 F.2d 650, 654 (9th Cir. 1977).

Our decision in *United States v. Benjamin* establishes that we have jurisdiction over defendants' appeal based on prosecutorial misconduct before the grand jury. That interlocutory appeal meets the requirements of *Cohen*. Consequently, the government's motion to dismiss No. 86-1388 is denied.[9]

APPEAL NO. 86-1387 DISMISSED.

MOTION TO DISMISS APPEAL NO. 86-1388 DENIED.

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[9] We of course express no opinion on the outcome of appellants' claims, which will be considered by a merits panel of this court. A briefing schedule will be established by separate order. Our denial of the government's motion to dismiss renders superfluous the defendants' conditional petition for writ of mandamus (No. 87-7052). It is dismissed as moot.

PETITION FOR WRIT OF MANDAMUS NO. 87-7055 DENIED.

PETITION FOR WRIT OF MANDAMUS NO. 87-7052 DISMISSED.

DAVID R. THOMPSON, Circuit Judge, dissenting:

This circuit has held that a district court's pre-trial order denying a motion to dismiss an indictment because of grand jury irregularities is not immediately appealable. *United States v. Garner*, 632 F.2d 758, 765 (9th Cir. 1980), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981). *See United States v. Bendis*, 681 F.2d 561, 569 (9th Cir. 1981), *cert. denied*, 459 U.S. 973, 103 S.Ct. 306, 74 L.Ed.2d 286 (1982); *United States v. Linton*, 655 F.2d 930, 932 (9th Cir. 1980) (per curiam), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 301 (1981). In *Garner* we stated:

> We are convinced that, especially in the criminal context, the policy against piecemeal appellate adjudication is sound and that the exceptions to the rule should be few. To allow an interlocutory appeal in this instance would create nothing short of chaos in the criminal justice system.

Garner, 632 F.2d at 766. Today, however, as they did in *United States v. Benjamin*, 812 F.2d 548 (9th Cir. 1987) ("*Benjamin I*"), the majority once again permits piecemeal appellate adjudication. In their view, if the defendants are not permitted to appeal at this stage of the case, *Mechanik v. United States*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) will prevent any post-conviction appellate review of errors that affected the grand jury proceedings to the defendants' detriment. I do not agree.

In *Benjamin I*, the claimed grand jury irregularity was an alleged violation of Federal Rule of Criminal Procedure 6(e). *Benjamin I*, 812 F.2d at 550. In moving to obtain disclosure of grand jury transcripts, the gov-

ernment had failed to disclose to the district court that the government's expert consultant, whto was a grand jury witness, was a party to a pending civil suit against the defendants. The district court denied a defense motion to dismiss the indictment for the claimed Rule 6(e) violation. The defense appealed the denial of that motion. A majority of a three-judge motions panel of this court denied the government's motion to dismiss the appeal, because according to the majority's reading of *Mechanik* the claim of error would be unreviewable if it were not raised prior to trial. *Id.* at 551-52. I dissented in *Benjamin I*

> [b]ecause of (1) the strong policy against piecemeal appellate adjudication; (2) the view that *Mechanik* should be narrowly construed (*see United States v. Taylor*, 798 F.2d 1337, 1340 (10th Cir. 1986) ("*Mechanik* was carefully crafted along very narrow lines, and it has not resulted in another exception to the final judgment rule.")); and (3) the distinction between a Rule 6(d) violation which affects the grand jury's decision to indict and a Rule 6(e) violation which may contravene the policy of grand jury secrecy. . . .

Id. at 556.

I dissent in this case for the first two reasons stated in my dissent in *Benjamin I*. The strong public policy against piecemeal appellate adjudication needs no elaboration. The view that *Mechanik* should be narrowly construed leads me to conclude that while *Mechanik* does not apply to the present case, *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986) does. In *Taylor*

> The defendants moved in the district court for dismissal of a multicount mail fraud indictment on several grounds: (1) invasion of the defense camp by the prosecution in violation of the attorney-client privilege and defendants' Sixth Amendment rights;

> (2) abuse of the grand jury through prosecutorial misconduct in the form of the prosecution's failure to present exculpatory evidence and its biasing of the grand jury with inadmissible, inflammatory, and prejudicial evidence; and (3) improper utilization of state officers in the grand jury investigation.

Taylor, 798 F.2d at 1338.

The district court in *Taylor* denied a defense motion to dismiss. The defense appealed. The government moved to dismiss the appeal, contending that the district court's order was not immediately appealable because it did not fall within the collateral order exception created by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). The Tenth Circuit stated: "The dispositive issue presented for review is whether the order has been made appealable by [*Mechanik*]." *Taylor*, 798 F.2d at 1338. The court held it had not and distinguished *Mechanik:*

> In *Mechanik*, no allegations were made that the government attempted to unfairly sway the grand jury or to otherwise affect the fairness of the accusatory process. There was no alleged pervasive attempt to charge without cause or to undermine the defense. In short, there was no question whether the government had transgressed the defendants' rights to fundamental fairness. The error of which the prosecution was guilty, at worst, was technical, and, at most, could have affected only the grand jury's determination of probable cause. Since the error was not discovered until after the trial began, the trial was more than three months in duration, and the outcome effectively eliminated any question of whether there was probable cause, the Court found the error was harmless.

The Supreme Court in *Mechanik* did not hold that a Rule 6 violation of any sort of any other act which

affects the fundamental fairness of the criminal proceedings discovered prior to trial is not justiciable after conviction. That is a critical distinction.

The issues raised by the defendants are not of the technical varitey. They are asserting that their right to fundamental fairness has been adversely affected by the various acts of which they complain. A petit jury determination of guilt will not moot these issues because they go beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment. Accordingly, to the extent they have been properly preserved, these issues can be raised upon appeal if the defendants are convicted. *See, e.g., United States v. Hinton*, 543 F.2d 1002 (2d Cir.), *cert. denied*, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976). We see no justification for abandonment of the long-standing principle that disfavors piecemeal appeals; therefore, this appeal must be dismissed. *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982).

Taylor, 798 F.2d at 1340 (footnote omitted).

The claims made by the defendants in the present case resemble the claims made in *Taylor*.[1] As in *Taylor*, the issues raised by the defendants in this case "are not of the technical variety. They are asserting that their right to fundamental fairness has been adversely affected by the various acts of which they complain. A petit jury

[1] In the present case, the "[d]efendants alleged that the prosecutor's misconduct before the grand jury included calling witnesses for the sole purpose of repeatedly forcing them to assert their fifth amendment privilege, harassing Synanon-associated witnesses, failing to present evidence that cast doubt on the credibility of witnesses, making derogatory comments about Synanon and the Synanon lifestyle, presenting irrelevant and false, prejudicial evidence, and abusing the grand jury's subpoena authority." (Majority opinion at 1319).

determination of guilt will not moot these issues because they go beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment." *Id.*

I would grant the government's motion to dismiss the appeals because I do not believe *Mechanik* compels the conclusion reached by the majority. I would deny the petitions for writs of mandamus due to the absence of any *Bauman* factors. *See Bauman v. United States*, 557 F.2d 650 (9th Cir. 1977).

I concur in the grant of the government's motion to dismiss the Dederich and Missakian appeal in No. 86-1387, and to deny Dederich and Missakian's conditional petition for writ of mandamus (No. 87-7055).

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 86-1337, 86-7717

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID R. BENJAMIN; PHILIP C. BOURDETTE; MIRIAM R. BOURDETTE; CECILIA J. DEDERICH; DAN L. GARRETT, JR.; ELIZABETH MISSAKIAN; SYBIL SCHIFF; STEVEN SIMON; DAN SORKIN,
Defendants-Appellants.

DAVID R. BENJAMIN; PHILIP C. BOURDETTE; MIRIAM R. BOURDETTE; CECILA J. DEDERICH; DAN L. GARRETT, JR.; ELIZABETH MISSAKIAN; SYBIL SCHIFF; STEVEN SIMON; DAN SORKIN, *Petitioners,*

v.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,
Respondent,

UNITED STATES OF AMERICA,
Real Party in Interest.

Motion to Dismiss Appeal
Submitted Dec. 11, 1986 *

Decided March 11, 1987

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 3(f) and Fed.R.App. P. 34(a).

Appeal from the United States District Court
for the Eastern District of California

Robert D. Luskin, Washington, D.C., Kenneth W. DeVaney, Fresno, Cal., Thomas J. Nolan, Palo Alto, Cal., Richard Mazer, San Francisco, California; Jay W. Powell, Visalia, Cal., Tom Henze, Phoenix, Arizona; Robert N. Harris, Los Angeles, Cal., Mark E. Overland, Los Angeles, Cal., John L. Williams, San Jose, Cal., and Salvatore Sciandra, Fresno, Cal., for defendants-appellants.

Guy L. Goodwin, Washington, D.C., for plaintiff-appellee.

Before CANBY, REINHARDT and THOMPSON, Circuit Judges.

CANBY, Circuit Judge:

Defendant-appellants seek review of the district court's denial of their motion to dismiss an indictment on the ground of irregularities in the grand jury proceedings. The government moves to dismiss the appeal for lack of jurisdiction. In light of the Supreme Court's decision in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed. 250 (1986), we find the district court order appealable under the collateral order doctrine.[1]

I. FACTS

Following lengthy federal grand jury proceedings, defendants were charged on October 1, 1985 in a 22-count indictment with conspiracy, concealment of material facts, obstruction of justice, and perjury. The indictment grew out of an IRS audit of The Synanon Church, and civil litigation between Synanon, the United States, and private parties in California State and District of Columbia

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[1] Defendants' appeal was submitted to this motions panel for considerations of the jurisdictional question. Accordingly, we rule only on the appealability of the district court order; the merits of appellants' appeal will be considered separately in due course.

courts. Defendants are charged with committing perjury and making false statements to conceal the destruction and alteration of documents and tape recordings pertaining to those proceedings.

From the outset, defendants apparently were concerned about participation of a government consultant, Dr. Richard Ofshe, in the grand jury investigation. At the time of the grand jury proceedings, Ofshe was involved in a civil action for intentional infliction of emotional distress, abuse of process, and malicious prosecution against six of the nine criminal defendants in this action.

Ofshe amended his civil action to charge the six defendants with systematic destruction and concealment of evidence in his and other civil suits, placing in issue the exact allegations that form the basis for the later indictment against defendants. Immediately after amendment of Ofshe's action, the government obtained an order from the United States District Court for the District of Columbia authorizing release of "documents and recordings subpeonaed by the grand jury to the government's expert, Richiard [sic] J. Ofshe." [2] District of Columbia Chief Judge Aubrey Robinson Jr. granted the request "for the purpose of assisting the federal grand jury and the United States Attorney in the investigation." [3]

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[2] *United States v. Benjamin*, No. CR-F-86-1 REC, slip op. at 23 (E.D.Cal. May 1, 1986) (Decision & Order Re Defense Motion for Disclosure of Grand Jury Transcripts and Minutes) (quoting government's Application for Disclosure Order Pursuant to Rule 6(e)(3)(C)(i) & 6(e)(3)(D), F.R.Cr.P.) (ER at 85).

By this time, Ofshe had already appeared several times as a witness before the grand jury. The extent of Ofshe's participation, and whether the charging grand jury was aware of his adverse interests to the defendants, is unclear.

[3] *In re Grand Jury Proceedings: Grand Jury 84-I, Possible Violations of 18 U.S.C. 1505, 1503, 371, 1001, 1962*, Misc. No. 84-096, slip op. at 3 (D.D.C. Aug. 2, 1984).

Although proceedings were initiated in the District of Columbia, on December 20, 1985, the case was transferred to the Eastern

To secure disclosure of the tape recordings and details of the investigation to Ofshe, the government represented to the district court that Ofshe's assistance was necessary to the investigation because "the federal investigative agency involved lacks familiarity with Synanon records and the voices appearing on Synanon tape recordings. . . ." [4] The record on appeal indicates that the government did not, however, inform the district court of Ofshe's civil suit against the defendants.[5] The record also indicates that before the government's *ex parte* motion for disclosure of the grand jury materials, the government was well aware of the civil suit and the fact that its expert consultant was seeking damages from defendants for the very conduct underlying the grand jury investigation.[6]

Defendants moved for discovery of the grand jury transcripts under Fed.R.Crim.P. Rule 6(e)(3)(C)(ii) in the District Court for the Eastern District of California. Through the court's May 1, 1986 order denying discovery in part, defendants learned of Ofshe's involvement in the grand jury proceedings; at the same time, defendants learned that the government failed to disclose Ofshe's interest to the District Court for the District of Columbia in moving to secure disclosure of the materials.

District of California on defendants' motion. *United States v. Benjamin*, 623 F.Supp. 1204 (D.D.C. 1985).

[4] *United States v. Benjamin, supra*, note 2, slip op. at 23.

[5] The Eastern District assumed this lack of notice for purposes of ruling on defendants' Motion to Dismiss the indictment. *United States v. Benjamin*, No. CR-F-86-1 REC, slip op. at 10 (E.D.Cal. Nov. 4, 1986) (Order Re Motion to Dismiss for Violation of Rule 6(e), Fed.R.Crim.P.).

[6] *United States v. Benjamin, supra*, note 5, slip op. at 10.

Defendants then moved for dismissal of the indictment for violation of Rule 6(e)(2)[7]. Judge Robert E. Coyle of the Eastern District of California denied the motion.[8] While acknowledging the government's failure to disclose Ofshe's interest to the District Court for the District of Columbia, he concluded that the problem was not serious and that the irregularity did not warrant dismissing the indictment.

Defendants appeal the order denying dismissal, asserting jurisdiction in this court under 28 U.S.C. § 1291. The government has now moved to dismiss.

II. APPEALABILITY

As a general rule, a party must "raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374, 101 S.Ct. 669, 673, 66 L.Ed.2d 571 (1981). Appellants seek to escape that rule by establishing that the district court's denial of their motion to dismiss is appealable as a "collateral order" under the doctrine of *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L.Ed. 1528 (1949). To qualify for this exception to the final judgment requirement, the order under appeal must meet three conditions.

> First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the

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[7] (2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules.

Rule 6(e)(2), Fed.R.Crim.P.

[8] *United States v. Benjamin, supra*, note 5.

> action"; third, it must "be effectively unreviewable on appeal from a final judgment."

Flanagan v. United States, 465 U.S. 259, 265, 104 S.Ct. 1051, 1055, 79 L.Ed.2d 288 (1984) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978)). It is the third requirement that is in dispute in this case, and it is the third requirement that has traditionally presented the greatest obstacle to interlocutory appeals like this one.

We have entertained claims of violations of Rule 6(e) and of other grand jury irregularities on appeal after final judgment. *United States v. De Rosa*, 783 F.2d 1401, 1404-07 (9th Cir.1986); *United States v. Claiborne*, 765 F.2d 784, 794-96 (9th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986); *United States v. Stone*, 633 F.2d 1272, 1275 (9th Cir.1979). As a corollary, we have refused to entertain such claims on interlocutory appeal of a district court's denial of a motion to dismiss an indictment. Our leading decision to that effect is *United States v. Garner*, 632 F.2d 758 (9th Cir.1980), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981). *Accord United States v. Bendis*, 681 F.2d 561, 569 (9th Cir.1981) (following *Garner*), *cert. denied*, 459 U.S. 973, 103 S.Ct. 306, 74 L.Ed.2d 286 (1982). While we also based our decision in *Garner* on the disruptive effect interlocutory appeals would have on the criminal justice system, the foundation of our decision was the availability of review after final judgment. We stated that the one unanswered question that the appeal presented under the *Cohen* analysis was "whether the particular right involved would be 'lost, probably irreparably' if immediate appellate review [were] not available." *Garner*, 632 F.2d at 765 (quoting *Cohen*, 337 U.S. at 546, 69 S. Ct. at 1225). And we answered that question in the concluding sections of our opinion when we quoted *In re Grand Jury Proceedings* (*Johanson*), 632 F.2d 1033, 1039 (3d Cir.1980):

> [F]lawed grand jury proceedings can be effectively reviewed by this court and remedied after a conviction [has] been entered and all criminal proceedings have been terminated in the district court. . . . Because delayed appellate review will not irreparably deny Johansen his right to an impartial grand jury (his conviction could be reversed if at a later stage we conclude the grand jury was tainted) the order is not reviewable immediately as a collateral order.

Garner, 632 F.2d at 766.

Appellants contend, however, that we cannot today deny their interlocutory appeal on the ground that their claim may effectively be reviewed after final judgment. They argue that effective review after conviction has been rendered unavailable by the recent decision of the Supreme Court in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986). In *Mechanik*, the defendants asserted, on appeal after conviction, that an irregularity in the grand jury proceedings rendered their convictions void. Although Fed.R.Crim.P. 6(d) provides that only "the witness under examination" shall be present at grand jury proceedings, two government witnesses had testified in tandem. The defendants did not discover the violation until after trial commenced. Defendants moved for dismissal, but the district court deferred ruling on the motion until the trial's conclusion. The district court then denied the defendants' motion. The Fourth Circuit set aside Mechanik's conspiracy conviction, which had been "tainted" by the Rule 6 violation. A divided Supreme Court reversed.

In its majority opinion, the Court assumed that simultaneous presence of the two witnesses violated Rule 6(d) and that the district court might have been justified in dismissing portions of the indictment prior to trial. *Mechanik*, 106 S.Ct. at 941. The Court held, however, that the supervening jury verdict established that any error

in the grand jury proceeding was harmless under Fed.Rd Crim.P. Rule 52(a). Therefore, reversal of the conviction and dismissal of the indictment were inappropriate:

> The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged but they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceedings connected with the charging decision was harmless beyond a reasonable doubt.

Mechanik, 106 S.Ct. at 941-42 (footnote omitted).

The question before us, then, is whether the effect of *Mechanik* will be to deprive appellants of any effective review of their claim after final judgment. Another way to put the question is to ask whether, after giving full precedential effect to *Mechanik*, we would be able to afford appellants any relief if their contentions proved to be meritorious. We conclude that the answer is "no."

First, it seems clear enough that the harmless error doctrine adopted by the majority in *Mechanik* rendered the claim of grand jury irregularities asserted by the defendant there effectively unreviewable. Indeed, the government concedes that a similar application of the harmless error rule to appellants' claims in this case would render them effectively unreviewable after final judgment.

It is true that there are distinctions between this case and *Mechanik*. Appellants here assert a violation of Rule 6(e)'s prohibition on disclosure of matters occurring before the grand jury, while Mechanik asserted a viola-

tion of Rule 6(d). We fail to see how this distinction could cause a difference in result, however. Appellants contend that the improper disclosure was to an interested witness for the purpose of assisting in the grand jury's investigation. The argument is primarily one of taint, or an improper effect on the grand jury's decision to indict. Yet any such effect on the grand jury's probable cause determination will, under the rationale of *Mechanik*, be rendered harmless if a petit jury finds appellants guilty beyond a reasonable doubt. We would not be free to avoid a harmless error analysis under Federal Rule of Criminal Procedure 52(a) because the *Mechanik* majority saw "no reason not to apply this provision to 'errors, defects, irregularities or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." *Mechanik*, 106 S.Ct. at 942 (citation omitted).[9]

There is another distinction between this case and *Mechanik*. The grand jury irregularity in this case was the subject of a motion made and ruled upon before trial. In *Mechanik* the irregularity was discovered, and the motion made, after the trial had begun. The majority in *Mechanik* stated: "We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial." *Id.* at 943 (footnote omitted). This disclaimer means that *Mechanik* does not automatically apply to our case, involving as it does the denial of a pretrial motion to dismiss.

Nevertheless, we are convinced that we would be failing to accord *Mechanik* the precedential effect that is

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[9] We intimate no views on the standard of review or application of the harmless error doctrine to be applied in an interlocutory appeal. We leave those matters for decision, if necessary, when the merits of this appeal are addressed.

fairly due it if we failed to apply its harmless error doctrine to appellants' claims after final judgment. Certainly the harmless error analysis that we have already quoted above would apply; the grand jury's reasonable cause determination would have been mooted by conviction upon a finding of guilt beyond a reasonable doubt. In addition, much of the emphasis of the *Mechanik* majority opinion is on the societal costs of retrial, including loss of witness' memory or availability, the possibility that the offender may escape retrial altogether, and delay in the administration of justice that may impede deterrence and rehabilitation. *Id.* at 942-43.

> These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.
>
> . . . In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings.

Id. at 943. We fail to see how this language could be considered inapplicable to the present contentions of appellants if they were raised after trial and conviction.

Two other Circuits have applied *Mechanik's* harmless error analysis to allegations of grand jury irregularities other than violations of Rule 6(d). In *Porter v. Wainwright*, 805 F.2d 930, 941-42 (11th Cir. 1986), the Eleventh Circuit applied *Mechanik's* harmless error rule to a claim of grand juror bias, brought on appeal after trial and conviction. The Seventh Circuit did the same with a claim of alleged prosecutor misconduct before the grand jury in *United States v. Thomas*, 788 F.2d 1250, 1254 (7th Cir.1986).

We conclude, therefore, that the effect of *Mechanik* is to render appellants' claims effectively unreviewable after trial. *See Mechanik*, 106 S.Ct. at 943 (concurring opinion of Justice O'Connor). Appellants' interlocutory appeal consequently satisfies the third *Cohen* requirement. *See id.* at 947 n. 1 (dissenting opinion of Justice Marshall) (*Mechanik* ruling could render denial of Rule 6(d) motion appealable before trial as collateral order).

We are aware of the decision of the Tenth Circuit in *United States v. Taylor*, 798 F.2d 1337, 1339-40 (10th Cir.1986). In that case, appellants had moved for dismissal of the indictment because the prosecution had "invaded the defense camp," had failed to present exculpatory evidence to the grand jury, had biased the grand jury with "inadmissible, inflammatory, and prejudicial evidence," and had improperly used state officers in the grand jury investigation. The district court denied the motion and appellants sought an interlocutory appeal. *Id.* at 1338. The court of appeals dismissed, holding that the grand jury irregularities could be effectively reviewed after final judgment notwithstanding *Mechanik*. The court of appeals ruled that the allegations of the appellants went beyond the question of probable cause and attacked the "fundamental fairness" of the criminal proceedings, which would be justiciable after final judgment and not subject to the *Mechanik* harmless error analysis. *Id.* at 1340.

We need not decide whether we agree with the court of appeals' characterization of the appellants' claims in *Taylor*. It is enough that we conclude that appellants' claims of violation of Rule 6(e) in the present case are sufficiently aimed at the grand jury's charging process that they fall within the ambit of *Mechanik*. The prejudice in this case that *Mechanik* would require us to evaluate in an appeal after conviction is an erroneous charging decision by the grand jury, for violations of Rule (6)(e), and *Mechanik* holds that any such prejudice

is wiped out by the petit jury's verdict. Nothing in *Taylor* leads us to change our conclusion that appellants' claim of irregularities has been rendered effectively unreviewable after final judgment.

The government does not seriously contest the fact that the order being appealed, having met the third *Cohen* requirement, also meets the first two. The district court's order was a final determination of the question whether the asserted violations of Rule 6(e) required dismissal of the indictment. Moreover, the order is collateral to the claims of guilt or innocence that are to be determined at the trial by a petit jury, under this indictment if appellants' appeal is unsuccessful or possibly under a later indictment if the appeal is successful. *See Garner*, 632 F.2d at 765.

We conclude, therefore, that the district court's order meets all of the requirements of *Cohen* and is now appealable under 28 U.S.C. § 1291 as a collateral order. We recognize that interlocutory appeals can be disruptive of the criminal justice system, *see Garner*, 632 F.2d at 766, but means may be found to expedite such appeals and to weed out groundless ones promptly. *See Richardson v. United States*, 468 U.S. 317, 322, 104 S.Ct. 3081, 3084, 82 L.Ed.2d 242 (1984); *Abney v. United States*, 431 U.S. 651, 662 n. 8, 97 S.Ct. 2034, 2042 n. 8, 52 L.Ed.2d 651 (1977). Our conclusion that the district court's order in this case is appealable as a collateral order stems not only from its meeting the technical requirements for an interlocutory appeal, but also from the fact that if no appeal is allowed at this stage, appellants will wholly fail to benefit from the protections Rule 6(e) imposes on the constitutionally-mandated grand jury process.[10] Errors that affected the grand jury proceedings to

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[10] "A major characteristic of the denial or granting of a claim appealable under *Cohen's* 'collateral order' doctrine is that 'unless it can be reviewed before [the proceedings terminate], it can never be reviewed at all.'" *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct.

the detriment of the accused, and that would have justified the district court in dismissing the indictment before trial, would go wholly unremedied if the district court itself erred in denying dismissal. We cannot believe that Congress and the Supreme Court intended such ineffectiveness for the Rule.[11] An interlocutory appeal will prevent that untoward result, and § 1291 is to be given a "practical rather than a technical construction." *Cohen*, 337 U.S. at 546, 69 S.Ct. at 1226 (citing *Cobbledick v. United States*, 309 U.S. 323, 328, 60 S.Ct. 540, 542, 84 L.Ed. 783 (1940)).

The government's motion to dismiss is denied. A briefing schedule will be established by separate order. Our disposition of this motion makes it unnecessary to address appellants' conditional petition for writ of mandamus.

MOTION TO DISMISS DENIED.

DAVID R. THOMPSON, Circuit Judge, dissenting:

This circuit has held that a district court's pre-trial order denying a motion to dismiss an indictment because of grand jury irregularities is not immediately appealable. *United States v. Garner*, 632 F.2d 758, 765 (9th Cir.1980), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1373, 67 L.Ed.2d 351 (1981). *See United States v. Bendis*, 681 F.2d 561, 569 (9th Cir.1981), *cert. denied*, 459 U.S. 973, 103 S.Ct. 306, 74 L.Ed.2d 286 (1982); *United States v.*

2806, 2815, 86 L.Ed.2d 411 (1985) (quoting *Stack v. Boyle*, 342 U.S. 1, 12, 72 S.Ct. 1, 7, 96 L.Ed. 3 (1951) (brackets in original)).

[11] We reject the government's contention that the right asserted by appellants under Rule 6(e) is not "important" enough to justify the delay in trial that is inherent in an interlocutory appeal. Rule 6(e) certainly protects important interests in ensuring grand jury secrecy. Whether the facts of appellants' case justify the remedy of dismissal of the indictment is not to be determined as a threshold test of appealability, but is rather a matter for determination when the appeal is heard on its merits.

Linton, 655 F.2d 930, 932 (9th Cir.1980) (per curiam), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 301 (1981). In *Garner* we stated:

> We are convinced that, especially in the criminal context, the policy against piecemeal appellate adjudication is sound and that the exceptions to the rule should be few. To allow an interlocutory appeal in this instance would create nothing short of chaos in the criminal justice system.

Id. at 766. Today, however, the majority would permit piecemeal appellate adjudication. In its view, *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), will "deprive appellants of any effective review of their claim after final judgment" (Majority Opinion at 551). Because I do not believe *Mechanik* compels this result, I respectfully dissent.[1]

In *Mechanik*, a federal grand jury returned an indictment charging defendants with drug-related offenses and conspiracy. The indictment was concededly free from any claim of error. The grand jury then returned a superseding indictment in which the conspiracy charge was expanded. In support of the superseding indictment, the United States Attorney presented the testimony of two law enforcement enforcement agents who were sworn together and questioned in tandem before the grand jury. The court stated:

> We assume for the sake of argument that the simultaneous presence and testimony of the two Government witnesses before the grand jury violated Rule 6(d), and that the District Court would have been justified in dismissing portions of the indict-

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[1] As the majority notes, "*Mechanik* does not automatically apply to our case" (Majority Opinion at 552). The *Mechanik* Court stated: "We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial." 106 S.Ct. at 943.

> ment on that basis had there been actual prejudice and had the matter been called to its attention before the commencement of trial.

Id. at 941. Through no lack of diligence on the part of the defense, the irregularity in the grand jury proceedings was not discovered until the second week of trial. A motion to dismiss the indictment was made at that time. Initially, the district court denied the motion on the ground that the two agents' testimony had not violated Rule 6(d). The motion was renewed during trial, taken under submission by the district court and denied after trial. The district court concluded Rule 6(d) had been violated, but the violation had not harmed the defendants. A divided Court of Appeals and a divided en banc panel of the Fourth Circuit reversed the conspiracy convictions and affirmed the defendants' convictions on other charges. In reversing the Fourth Circuit's dismissal of the conspiracy portion of the indictment, the Supreme court stated:

> Both the District Court and the Court of Appeals observed that Rule 6(d) was designed, in part, "to ensure that grand jurors, sitting without the direct supervision of a judge, are not subject to undue influence that may come with the presence of an unauthorized person." 735 F.2d [136] at 139. The Rule protects against the danger that a defendant will be required to defend against a charge for which there is no probable cause to believe him guilty. *The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged.* But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's ver-

> dict, then, *any error in the grand jury proceedings connected with the charging decision* was harmless beyond a reasonable doubt. (emphasis added)

Id. at 941-42.

In the present case, appellants claim that Rule 6(e) was violated. The government failed to disclose to the district court, in an ex parte motion to obtain disclosure of grand jury materials, that a grand jury witness (the government's expert consultant Ofshe) was also a party to a pending civil action against the appellants. Ofshe's civil action involved claims based on allegations identical to those in the criminal case. The district court granted the ex parte motion. As a result, appellants argue, grand jury evidence, required to be kept secret by Rule 6(e), was disclosed to Ofshe.

Although the majority characterizes the alleged violation as one of "taint, or [having] an improper effect on the grand jury's decision to indict" (Majority Opinion at 552), the record does not suggest that the grand jury's decision to indict was affected in any way by the disclosure of information to Ofshe. I believe a distinction may be drawn between the Rule 6(d) violation in *Mechanik* and the Rule 6(e) violation claimed by appellants. In *Mechanik*, the Supreme Court noted that Rule 6(d) was designed, in part, to ensure that grand jurors are not subject to undue influence in their decision to indict. 106 S.Ct. at 941-42. Rule 6(e), however, was designed to "codif[y] the traditional rule of grand jury secrecy." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 745 (1983).

The Supreme Court has delineated the interests served by safeguarding the secrecy of grand jury proceedings:

> First, if pre-indictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that

> testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against the indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219, 99 S.Ct. 1667, 1673, 60 L.Ed.2d 156 (1979) (quoted in *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743 (1983)). *See United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82, n.6, 78 S.Ct. 983, 985-86 n.6, 2 L.Ed.2d 1077 (1958).

While one might hypothesize circumstances in which a violation of Rule 6(e) could affect a grand jury's decision whether to indict, those circumstances are not present in this case. Since they are not, should the appellants be convicted at trial, *Mechanik* will not preclude post-trial appellate review of the issue appellants seek to raise in this interlocutory appeal. "[T]he petit jury's verdict [will only render] harmless any conceivable error in the *charging decision* that might have flowed from the violation." *Mechanik* 106 S.Ct. at 943 (emphasis added). The grand jury's charging decision in this case did not flow from the claimed violation of Rule 6(e) and, therefore, *Mechanik* is inapposite. The appellants will retain whatever post-conviction right of review they had pre-*Mechanik*. Accordingly, they should be precluded from raising in this interlocutory appeal their claim that Rule 6(e) was violated.[2]

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[2] *See United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986), in which the Tenth Circuit held that *Mechanik* would not preclude

Because of (1) the strong policy against piecemeal appellate adjudication; (2) the view that *Mechanik* should be narrowly construed (*see United States v. Taylor*, 798 F.2d 1337, 1340 (10th Cir. 1986) ("*Mechanik* was carefully crafted along very narrow lines, and it has not resulted in another exception to the final judgment rule.")); and (3) the distinction between a Rule 6(d) violation which affects the grand jury's decision to indict and a Rule 6(e) violation which may contravene the policy of grand jury secrecy, I respectfully dissent.

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post-trial review of claims of grand jury irregularity which raised issues "beyond the question of whether the grant jury had sufficient evidence upon which to return an indictment." *Id.* at 1340. *And see United States v. Stone*, 633 F.2d 1272 (9th Cir. 1979), court of appeals in a pre-*Mechanik* decision reviews claimed violation of Rule 6(e) in post-trial appeal; comments that contempt rather than dismissal of indictment is more appropriate sanction for Rule 6(e) violation. *Id.* at 1275.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR-F-86-1 REC

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAVID BENJAMIN, *et al.*,
Defendants.

ORDER RE MOTION FOR DISMISSAL OF INDICTMENT DUE TO PROSECUTORIAL MISCONDUCT

[Filed Dec. 2, 1986]

On September 29, 1986, the court heard defendants' Motion for Dismissal of Indictment Due to Prosecutorial Misconduct. Upon due consideration of the written and oral arguments of the parties and the record herein, the court enters its order denying defendants' (except as to defendant Sybil Schiff) motion for the reasons set forth herein.

By this motion, defendants move the court for an order dismissing the indictment due to serious and prejudicial prosecutorial misconduct that permeated the Grand Jury proceedings. Defendants further assert that they have a right to an evidentiary hearing for the purpose of proving the claim of prosecutorial misconduct.

A. *Right to Evidentiary Hearing.*

Defendants cite *United States v. Oaks*, 508 F.2d 1403, 1404 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976), a case involving a claim of discriminatory selective prosecution, that "[h]earings on similar pretrial objections are usually in order when enough facts are alleged to take the question past the frivolous stage." More to the point for purposes of this motion is *United States v. Irwin*, 612 F.2d 1182, 1187 (9th Cir. 1980):

> As stated earlier the district court denied the motions to dismiss the indictment without an evidentiary hearing. If, in fact, a material issue of fact were raised 'which if resolved in accordance with [appellant's] contentions would entitle him to relief', an evidentiary hearing would be required. . . . On the other hand, if the affidavits show as a matter of law that appellant was or was not entitled to relief, no hearing was required.[14]

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[14] As this court said in *Carrion, supra*, 463 F.2d at 706, 'Evidentiary hearings need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that relief must be granted if the facts alleged are proved.'

Factual conflicts which are not sufficiently material do not mandate an evidentiary hearing, *United States v. Mitchell*, 572 F.Supp. 709, 711 n.2 (N.D.Cal. 1983), *aff'd.* 736 F.2d 1299 (9th Cir. 1984), *cert. denied sub nom. Patterson v. United States*, —— U.S. ——, 88 L.Ed.2d 77 (1985).

B. *Dismissal for Prosecutorial Abuse of Grand Jury.*

There are two theories governing dismissal of an indictment for prosecutorial misconduct: constitutional and supervisory powers. As explained in *United States v.*

Sears, Roebuck & Co., Inc., 719 F.2d 1386, 1391-1392 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984):

> Because the constitutional doctrine of separation of powers mandates judicial respect for the independence both of the grand jury . . . and of the prosecutor . . ., an indictment may be dismissed only in 'flagrant case[s]' of prosecutorial misconduct. . . .
>
> . . . Dismissal of an indictment is therefore warranted on constitutional grounds if the prosecutorial misconduct has undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it . . . . The relevant inquiry therefore focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality.

Dismissal based on the exercise of a court's supervisory power serves the purposes of deterring illegality and protecting judicial integrity. *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980), *rehearing denied*, 448 U.S. 911 (1980). In deciding whether to invoke the supervisory power to dismiss an indictment, the court considers the egregiousness of the prosecutor's misconduct, the need to discipline the particular prosecutor in light of any past misconduct, and the effectiveness of any available sanctions that are less drastic than dismissal of the indictment. *United States v. McClintock*, 748 F.2d 1278, 1284-1285 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 88 L.Ed.2d 61 (1985). In addition, the cumulative effect of a prosecutor's improprieties before the Grand Jury may require dismissal even though the instances of misconduct, taken separately, would not. *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979). However, even when relying upon the cumulative effect, a defendant must demonstrate that the prosecutor engaged in flagrant misconduct that deceived the Grand

Jury or significantly impaired its ability to exercise independent judgment, *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), *cert. denied*, 461 U.S. 932 (1983). The Ninth Circuit has recently reemphasized the stringent standards and burden placed upon a defendant seeking to dismiss an indictment based on either due process grounds or the court's inherent supervisory powers.

> A defendant who challenges the indictment on either ground bears a heavy burden to demonstrate that the prosecutor engaged in flagrant misconduct deceiving the grand jury or significantly impairing its exercise of independent, unbiased judgment . . . . Moreover, the defendant must show that the prosecutorial misconduct prejudiced him.

United States v. Venegas, 800 F.2d 868, 869-870 (1986). Moreover, "[e]ven if the prosecutor's actions constituted misconduct, [a defendant] must demonstrate a reasonable inference of bias on the part of the grand jury resulting from those actions." *United States v. De Rosa*, 783 F.2d 1401, 1406-1407 (9th Cir.), *cert. denied*, —— U.S. ——, 91 L.Ed.2d 571 (1986).[1]

Defendants assert that dismissal of this indictment on either or both of these theories is required because the prosecutor engaged in conduct which impaired the independence and impartiality of the Grand Jury by 1) systematically forcing witnesses associated with Synanon to assert their privilege against self-incrimination; 2)

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[1] During oral argument, defendants contended that the standards set forth in *Al Mudarris* apply only to post-conviction appeals. They further argued that *Samango*, involving affirmance from a dismissal of an indictment under the supervisory powers, utilized a different standard, which standard should be employed in ruling on this motion. The court, after reviewing both decisions with defendants' argument in mind, can find no hint that the standards quoted above are not applicable to a pretrial motion to dismiss for prosecutorial misconduct.

making prejudicial and derogatory remarks about defendants in front of grand jurors and harassing Grand Jury witnesses; 3) failing to present evidence of the doubtful credibility of certain witnesses; 4) making derogatory references to the Synanon lifestyle, biasing the Grand Jury and violating defendants' First Amendment rights to freedom of religion, association, and expression; and 5) undermining the independence of the Grand Jury by the introduction of irrelevant, false and highly prejudicial evidence. Defendants also assert as a ground for dismissal that the prosecutor abused the Grand Jury's subpoena authority.

The court concludes that many of the alleged instances of prosecutorial misconduct either did not occur or were not misconduct. Those few instances wherein the actions of the prosecutor might have been improper, the court does not believe that dismissal of this indictment upon either constitutional or supervisory grounds is mandated given the controlling standards cited above. This is especially the case herein given defendants' admission that they are seeking dismissal of this indictment under the cumulative effect standard set forth in *United States v. Samango, supra.*

1. *Systematic Pattern of Calling Witnesses for Sole Purpose of Forcing Them to Claim the Fifth Amendment Privilege.*

It is not *ipso facto* misconduct for a prosecutor to call a witness knowing in advance that the witness will claim the Fifth Amendment privilege against self-incrimination. As explained in *United States v. Horowitz*, 452 F.Supp. 415, 418 (S.D.N.Y. 1978):

> Little need be said with regard to Mongello's claim of prosecutorial misconduct. That the government sought to question Mongello concerning his knowledge of the events under investigation while aware that Mongello intended to assert his privilege was

not improper. *United States v. Wolfson*, 405 F.2d 779, 785 (2d Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S.Ct. 1275, 22 L.Ed.2d 479 (1969). Indeed, even were Mongello subpoenaed to testify, it would not have been improper to call him even were the government previously informed that the privilege would be claimed, unless Mongello were called solely for the purpose of displaying his claim of privilege to the grand jury. *United States v. Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933, 89 S.Ct. 1205, 22 L.Ed.2d 463 (1969).

Moreover, Title 9, Chapter 9-11.254 of the United States Attorneys' Manual (3-6-80) provides:

> A question frequently faced by federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify he will refuse to testify on Fifth Amendment grounds. Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself. However, if a 'target' of the investigation (as defined in 9-11.250, *supra*) and his attorney state in a writing signed by both that the 'target' will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appearance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its

unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry. (See 9-11.251, *supra*).

In arguing that the prosecutor engaged in a systematic pattern for the sole improper purpose, defendants have submitted the transcripts of the Grand Jury testimony of defendants Philip C. Bourdette, Cecilia Jason Dederich, Sybil Schiff and Steven Simon. However, the transcripts show that Philip Bourdette claimed the Fifth Amendment to 17 of 34 questions, that Cecilia Jason Dederich did so to 115 of 168 questions, that Sybil Schiff did so to 39 of 53 questions, and that Steven Simon did so to 31 of 66 questions. Moreover, Philip Bourdette and Dederich had been served with grand jury subpoenas duces tecum. Philip Bourdette, Dederich and Simon had been directed by the Grand Jury to provide handwriting exemplars for the use of the Grand Jury in its investigation.

Defendants also state that in footnote 6 that defendants Elizabeth Missakian, Miriam Bourdette, and David Benjamin, "were called briefly, claimed their Fifth Amendment privileges, and were excused [and that i]n all these cases, Goodwin knew in advance that the privilege would be claimed." Defendants refer the court to paragraph 3 of the Declaration of Thomas J. Nolan in Support of Motion for Dismissal of Indictment Due to Prosecutorial Misconduct, which avers in pertinent part: "I am informed and believe that counsel for the other individuals had informed Goodwin that these individuals would also assert their Fifth Amendment privilege." While there is serious question that Goodwin was informed prior to testifying that Missakian intended to invoke the Fifth Amendment privilege to all questions of the Grand Jury, *see* Declaration of Guy Goodwin, paragraph 3, and Declaration of William Schaffer, paragraphs 7 and 8, filed in connection with the Motion for Disclosure of Grand Jury Transcripts and Minutes, it is not disputed by the Government that Goodwin was so

informed by counsel for Miriam Bourdette and David Benjamin. Miriam Bourdette and Missakian, however, had been directed by the Grand Jury to provide handwriting exemplars for the use of the Grand Jury in its investigation.

While at oral argument the Government conceded that Sybil Schiff might have been called for an improper purpose, the Government argues that this concession does not establish the systematic pattern alleged by defendants. The court agrees. The court, moreover, does not see that any prejudice that may have resulted to defendant Schiff transmutes to prejudice to each defendant herein such that dismissal of this indictment against all defendants is required. With regard to defendant Schiff, however, the court cannot determine from the record now before it whether the prosecutor's actions compel dismissal of the indictment against Schiff. In order to do so, the government is ordered to submit *in camera* those portions of the Grand Jury transcripts setting forth the evidence presented against Sybil Schiff on or before January 5, 1987. Upon receipt of these transcripts, the court will make such further orders as are necessary.

As further support for this portion of the motion, defendants refer the court to the prosecutor's action in failing to inform witness Ronald Cook or his counsel that Goodwin had already obtained a court order granting Cook immunity prior to Cook's appearance before the Grand Jury on November 13, 1984, thereby causing Cook to assert his Fifth Amendment privilege during his testimony on November 13, 1984.[2]

In this motion, defendants assert that they "are not disputing whether Mr. Goodwin had a legal duty to dis-

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[2] *See* page 31, line 7 through page 36, line 24 of Decision and Order Re Defense Motion for Disclosure of Grand Jury Transcripts and Minutes filed May 1, 1986 for the parties' respective factual positions.

close the immunity." Rather, they argue that Goodwin's action had a dual prejudicial impact:

> First, Mr. Cook's refusal to answer questions was yet another in Goodwin's parade before the Grand Jury of claims of privilege by residents and former residents of Synanon—each separately and all cumulatively casting a prejudicial negative light on Synanon and all defendants here. Second, Mr. Cook's claim of privilege prejudicially affected the Grand Jury's view of his testimony, later given under immunity: because of the initial refusal to testify, the incriminating portions doubtless were taken to be only the tip of the iceberg, while the exculpatory portions (of which there were many) doubtless were viewed as unbelievable, a vestige of the same uncooperative and secretive attitude that led to the initial claim of privilege. In this way, Goodwin ensured that the negative impact of Mr. Cook's later immunized testimony would be maximized.

The court cannot accept this argument. Any witness testifying under a grant of immunity is going to have a "negative impact" and the court does not see that the timing of the disclosure of that immunity will make any difference. The first part of defendants' argument is a bootstrap based on a premise of which the court is not persuaded. *See* discussion *supra*.

Defendants further refer to the fact that the prosecution called Christopher Reynolds as a witness, despite the fact, according to paragraph 2 of the Declaration of Chris P. Andrian, counsel for Reynolds:

> 2. In the spring of 1984, Mr. Reynolds was contacted by Guy Goodwin of the United States Department of Justice. Mr. Reynolds referred Mr. Goodwin to me and during my conversation with Mr. Goodwin, he told me that he wanted to interview Mr. Reynolds regarding document destruction at Syna-

non. I informed Mr. Goodwin that Mr. Reynolds was not interested in speaking with him. Mr. Goodwin told me that the Government knew that Mr. Reynolds had information about document destruction at Synanon and that if Mr. Reynolds did not cooperate with the Government, he could be indicted. Mr. Goodwin gave me a subpoena compelling Mr. Reynolds to appear before a grand jury in Washington, D.C. I informed Mr. Goodwin that under the circumstances, Mr. Reynolds would be asserting his Fifth Amendment privilege against self-incrimination in response to any questions. Despite this fact, Mr. Goodwin required Mr. Reynolds to travel to Washington, D.C. from the San Francisco Bay Area and to testify before the Grand Jury for approximately five minutes. Mr. Reynolds claimed the Fifth Amendment privilege to a few questions and was excused. No further effort has been made by any member of the Department of Justice to secure information from Mr. Reynolds, concerning this matter.

In paragraph 6 of the Declaration of Guy L. Goodwin, filed in opposition to this motion, it is averred:

> 6. Chris Reynolds was subpoenaed to appear before the federal grand jury in the District of Columbia on April 19, 1984. Neither Chris Reynolds nor his attorney Chris Andrian advised declarant in writing that Mr. Reynolds intended to invoke Fifth Amendment rights to all questions asked in the grand jury. Declarant did not state to Chris Reynolds or his attorney that if Reynolds did not cooperate with the grand jury he would be indicted, however Reynolds and his attorney were advised that evidence implicated Mr. Reynolds as a target.

The government further points out that neither Andrian nor Reynolds executed a writing expressing Reynolds' in-

tention to claim the Fifth Amendment privilege. The government contends:

> Reynolds appeared and was asked a very few questions to which he claimed the Fifth Amendment. It can hardly be said this was a prejudicial incident in the long and exhaustive grand jury investigation. Nor does it demonstrate a systematic pattern sufficient to override the grand jury's independent judgment. Since the grand jury did not indict Mr. Reynolds it seems obvious that they were not prejudiced by his invocations of the Fifth Amendment.

Defendants reply that this argument misses the point. They argue that the lack of prejudice to Reynolds does not diminish the prejudice to the defendants resulting from "compelling witnesses closely associated with Synanon to assert their Fifth Amendment privilege . . . . The Government has not shown any reason for bringing Mr. Reynolds across the country after Mr. Reynolds told Mr. Goodwin of his intention to assert his privileges. In the absence of any explanation, this Court can only conclude that there was no legitimate purpose for this conduct." Even if, however, the court were to conclude that the prosecutor had no legitimate purpose for calling Reynolds as a witness, the court cannot further conclude that a systematic pattern has been established or that an inference thereof results.

The court concludes, therefore, that the prosecutor did not engage in a systematic pattern of calling witnesses for the sole purpose of forcing them to claim the Fifth Amendment privilege.[3]

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[3] In the absence of a declaration from Geoff Gitner, the court disregards defendants' assertion that Goodwin asked Gitner during his testimony before the Grand Jury "[h]ow [Gitner] could . . . continue to work with and rely on Phil and Miriam Bourdette, who had indicated their intention to assert the Fifth Amendment privilege?" In paragraph 2 of his declaration filed in connection with this motion, Goodwin denies that Gitner was asked this question.

2. *Prejudicial and Derogatory Remarks and Harassment of Grand Jury Witnesses.*

Defendants assert that the prosecutor breached his constitutional obligation not to use the grand jury to make personal attacks or to influence the grand jury's ability to evaluate the evidence independently and impartially. As explained in *United States v. Di Grazia*, 213 F.Supp. 232, 235 (N.D.Ill. 1963):

> The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons . . . . It is the duty of a prosecutor presenting a case to a Grand Jury not to inflame or otherwise improperly influence the jurors against any person.

In arguing that the prosecutor made prejudicial and derogatory remarks about defendants in front of grand jurors and that he harassed grand jury witnesses, defendants refer the court to David Benjamin, Dennis Speert, Yvette Van Dalsem, and Ronald Cook.[4]

With regard to the arguments concerning David Benjamin, Benjamin avers in paragraph 2 of his declaration:

> 2. On September 26, 1985, I approached Mr. Goodwin to speak with him in the hallway outside the grand jury room in the United States Courthouse in the District of Columbia during a recess of the Grand Jury. In the hallway, I told Mr. Goodwin

[4] In its Decision and Order Re Defense Motion for Disclosure of Grand Jury Transcripts and Minutes filed on May 1, 1986, the court ordered the transcripts of Dennis Speert's August 27, 1985 testimony, of Yvette Van Dalsem's September 12, 1985 testimony, and of Ronald Cook's November 29, 1984 testimony provided to the court *in camera*.

> that I was acting as my own counsel to date and that I wanted to speak with Mr. Goodwin as a target and a lawyer representing myself. I asked Mr. Goodwin whether, if there were indictments handed down, I could surrender, rather than being transported from California to Washington in custody. Mr. Goodwin said that he would not talk to me. Thereupon, Mr. Goodwin walked toward a group of about seven Grand Jurors in recess in the hallway and loudly stated that he would not speak with me. All of the Grand Jurors present could easily hear his comments, if they had normal hearing. Mr. Goodwin then motioned the Grand Jurors to enter the grand jury room from their recess, laughed, and said to the group, 'I keep telling him I can't talk to him.' Several of the Grand Jurors laughed.

In paragraph 6 of Goodwin's declaration filed in opposition to the Motion for Disclosure of Grand Jury Transcripts and Minutes, it is averred in pertinent part: "[T]his declarant at no time yelled at David Benjamin in the presence of Grand Jurors."

Defendants assert: "Mr. Goodwin simply chose this opportunity to ridicule and embarrass Mr. Benjamin in front of several Grand Jurors, in sharp contrast to his previous dealings with Mr. Benjamin wherein he was always cordial and courteous. The image Goodwin gave the Grand Jurors of Mr. Benjamin was that of a target seeking favors by violating a rule he had previously been told about." Defendants futher assert "that the prejudicial impact is obvious and is akin to that condemned by the court in *United States v. Kilpatrick*, 575 F.Supp. 325, 333 (D.Colo. 1983)." The court does not agree that Benjamin's averment, assuming it to be true, even remotely approaches the conduct condemned in *Kilpatrick*. Moreover, the inferences of ridicule and special consideration drawn by defendants from this occurrence are, in the court's opinion, highly overstated. The court does not consider that Goodwin's actions were misconduct.

With regard to the alleged harassment of Dennis Speert, defendants believe that the court's review of Speert's testimony will reveal the following misconduct:

> Goodwin demanded that Mr. Speert act as the Grand Jurors' and Goodwin's investigator, ordering Mr. Speert to uncover information about various topics (on which Mr. Speert had no first-hand knowledge) and to report to the Grand Jury at a later date. Despite making these demands on a large number of different subjects, the prosecutor refused to permit Mr. Speert to take notes of the questions he was supposed to answer at his next appearance.

The court has reviewed Speert's August 27, 1983 testimony. Defendants' belief quoted above as to what Speert's testimony will reveal is not correct and constitutes a highly exaggerated, if not inflammatory, statement of what did occur before the Grand Jury. The requests made of Speert were entirely proper.

Defendants further argue:

> Moreover, Goodwin repeatedly expressed cynicism and skepticism when Mr. Speert stated that he did not know the answer to a specific question. Goodwin made statements to the effect of 'as President of Synanon you mean to say you don't know the answer to that question?' This conduct was threatening, oppressive, intimidating, and served no legitimate purpose other than to terrify Mr. Speert as a witness and to prejudice Synanon and Synanon's leadership in the eyes of the Grand Jurors.

Again, the court concludes from its review of Speert's testimony that Goodwin did not act improperly in his questioning of Speert.

With regard to the alleged harassment of Van Dalsem, defendants submit the Declaration of Yvette Van Dalsem filed in connection with defendants' Motion for Disclosure

of Grand Jury Transcripts and Minutes, which declaration avers in pertinent part:

> 3. On September 12, 1985, I had been testifying at length about the manner in which tape recordings were gathered under my direction at Synanon to respond to the Grand Jury's subpoena duces tecm. Mr. Goodwin asked me if Synanon had produced all of the tape recordings in its possession which were responsive to that subpoena. Mr. Goodwin demanded that I answer this question only with a yes or a no. I explained to Mr. Goodwin that I could only tell him that Synanon had produced the responsive tape recordings which could be located based upon a reasonable search in the short time available, and I explained the scope of that search many times. I explained several times that I could not state under oath that every responsive tape recording in Synanon's possession anywhere had been found, due to the fact that tapes may not have been located in our search. I assured Mr. Goodwin that I produced every responsive tape I could find and that I felt satisfied that the search was thorough. Mr. Goodwin's insistence on a yes or no answer caused me to leave the grand jury room to consult with my attorney. One of the times I left the room to discuss this situation with my attorney, I heard Grand Jurors laughing. Mr. Goodwin's facial expressions and tone throughout this questioning made me extremely uncomfortable, because it seemed that he believed I was being untruthful.
>
> 5. Shortly after this incident and before I was excused, I asked to make something clear. I felt it was important to remind Mr. Goodwin that in the documents Synanon had produced more than two weeks before, there were sheets of paper indicating where privileges were claimed for certain withheld paper documents. Therefore, I stated that it was

> my understanding that Mr. Goodwin had already been informed that certain paper documents which had been subpoenaed by the Grand Jury had been withheld from production on a claim of privilege. Upon hearing this, Mr. Goodwin put his foot up on the table in front of him and used it to shove his chair away from the table, threw his writing instrument on the table and rolled his eyes. Mr. Goodwin previously had let me to be believe that his need of me as a witness was soon to be done and that I could return to my home in California that day. Instead, Mr. Goodwin ordered me to appear again before the grand Jury in five days, on Tuesday, September 17, 1985, to answer questions about the privileged documents. Upon leaving the grand jury room, I was in tears by Mr. Goodwin's harassment of me on the witness stand and because I had expected to be excused so that I could return home. Through negotiations between my attorney and Mr. Goodwin, I was not required to reappear on September 17, so I could return home as scheduled, but I had to return to testify again on September 24 and 26.

Paragraph 6 of the Declaration of Guy Goodwin filed in connection with the Motion for Disclosure of Grand Jury Transcripts and Minutes avers in pertinent part: "This declarant did not make facial expressions of disbelief or disapproval when Yvette Van Dalsem, Ronald V. Cook or any other witness testified before the Grand Jury; this declarant did not throw a pen or pencil on a table in an expression of disbelief, disapproval, or for any other reason during the testimony of Yvette Van Dalsem or any other witness; this declarant did not at any time order or direct Yvette Van Dalsem or any other person to answer yes or no to questions insusceptible of such answers during appearances in the grand jury."

The court has reviewed Van Dalsem's September 12, 1985 testimony and it simply does not support her claims

of harassment set forth in paragraphs 3 and 5 of her declaration. While there is a factual conflict concerning the making of gestures during the presentation of Van Dalsem's testimony, the court does not consider this conflict to be sufficiently material to require an evidentiary hearing with regard to it, especially given the exaggerated averments in paragraphs 3 and 5 of her declaration. And even were the court to find that the prosecutor made gestures during Van Dalsem's testimony, the court is persuaded from the context that they would not constitute misconduct or misconduct such that dismissal of the indictment against all of the defendants herein is required. *See United States v. Pabian*, 704 F.2d 1533, 1539-1540 (11th Cir. 1983).

With regard to the November 29, 1984 testimony under grant of immunity of Ronald V. Cook, defendants assert that Goodwin "overstepped the line between proper and impermissible questioning by asking questions in a way calculated to bias the Grand Jury against the defendants." According to the declaration of Cook's counsel, Dominic P. Gentile, filed in connection with the Grand Jury discovery order:

> 28. On his trips out of the Grand Jury room to consult with me, Mr. Cook reported to me that when he would assert the marital privilege from to time Mr. Goodwin was deliberately utilizing facial expressions and bodily gestures which communicated his disapproval and scorn of Mr. Cook's assertion of the marital privilege and that these expressions were done in the presence and within the view of the Grand Jurors. It was Mr. Cook's belief that the Grand Jurors were responding to Mr. Goodwin's body language. Mr. Cook advised me that this belief was based upon the fact that at one time he actually heard a Grand Juror hiss simultaneously with Mr. Goodwin's gestural ridicule of Mr. Cook.

29. Mr. Cook also advised me from time to time that Mr. Goodwin would use the technique of asking him a question which called for a narative [sic] response and, when Mr. Cook would assert a marital privilege to that question, Mr. Goodwin would follow the marital assertion with another question which was framed in such a manner to assume as a fact what was sought by the previous question. For example, at one time in the proceedings Mr. Goodwin asked Mr. Cook a question to the following effect:

Question: Were you present at the beating of four people in the basement at the Synanon facility in Santa Monica?

Answer: I refuse to answer that question based upon my marital testimonial privilege.

Question: During that beating of four people in Santa Monica, *for which you were present*, was (so-and-so) . . . also present?

30. In addition to the foregoing example, there were many, many reports made to me by Mr. Cook that Mr. Goodwin would ask questions that were both leading, compound and pregnant. For example, just prior to Mr. Cook being resleased from the Grand Jury at approximately 4:03 p.m., Mr. Cook was asked the question which he reported to me in the following language:

Question: Were you aware that Paul Marantz was assaulted and that Charles E. Diedrich and others pled *nolo contendere* to that charge?

When Mr. Cook came out to report this question to me it was obvious to me that it was compound and that if he were to answer it 'yes' or 'no' he could easily be prosecuted for perjury because he could have been aware that Mr. Marantz was assaulted

but not aware that Mr. Diedrich and others had pled, or vice versa, or he could have been totally unaware of either aspect of the question.

However, the court's review of the transcript does not reveal any improper questioning by Goodwin rising to the level of misconduct. Defendants assert that the questions asked of Cook concerning his presence at the beating in Santa Monica is misconduct similar to that condemned in *United States v. Serubo*, 604 F.2d 807, 814-815 (3d Cir. 1979). The court does not agree. In *Serubo*, the concern was with the prosecutor's failure to lay a foundation for his attempt to link the defendants with organized crime and with the prosecutor's failure to inform the grand jury that the persons of whom the witness was being questioned concerning his knowledge of loan sharking brought against those persons had in fact been acquitted of those charges. Here, Cook was testifying under a grant of use immunity. Cook, however, claimed the marital testimonial privilege to virtually every question asked of him, including the questions concerning his presence at or knowledge about the beating in Santa Monica. While the court must agree with defendants that the questions concerning this incident were to some extent leading and based on facts the foundation for which is not apparent in this witness's testimony, defendants do not argue that the foundation could not be laid.

While Judge Robinson subsequently granted the government's motions to compel with regard to questions propounded to Cook and to which he claimed the marital testimonial privilege, *see* Exhibit S, defendants nonetheless assert that "it was improper for the prosecutor to discredit Mr. Cook's reliance upon his privileges [by gestures and tone of voice], and that the resulting prejudice was suffered not only by Mr. Cook, a Synanon associate, but by all the defendants associated with Synanon." They further contend that "[i]n an analogous situation,

an indictment was dismissed because the prosecutor, in the presence of the grand jury, challenged the sincerity of the witness' claim against self-incrimination and threatened to bring her before the judge. *See United States v. Di Grazia*, 213 F.Supp. 232 (N.D.Ill. [19]63. The misconduct here was much the same." Here, Mr. Goodwin made no overt challenge to the sincerity of Cook's claim of the marital testimonial privilege in the presence of the Grand Jury and certainly did not threaten to take Cook before a judge. Moreover, from the courts review of this transcript, any discrediting of Cook, if indeed any occurred, resulted primarily if not entirely from Cook's repeated invocation of the marital testimonial privilege in response to questions to which it clearly did not apply.

3. *Failure to Present Evidence of Doubtful Credibility.*

The government need not produce before the Grand Jury evidence which tends to undermine the credibility of its witnesses. *Jack v. United States*, 409 F.2d 522, 524 (9th Cir. 1968), *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968). However, "'[i]f evidence exists, however, which casts serious doubts on the credibility of testimony which the jurors are asked to rely upon in finding an indictment, the prosecutor has an ethical duty to bring it to their attention.'" *United States v. Samango, supra* at 882 n.8. And "where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict. See ABA Project on Standards for Criminal Justice—The Prosecution Function, § 3.6, pp. 90-91." *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979).

Here, defendants contend that the apparent failure by the prosecutor to inform the Grand Jury that Dr. Richard

Ofshe was a defendant and counter-claimant in a libel action involving Synanon and some of the defendants herein and the apparent failure by the prosecutor to inform the grand jury about doubts expressed concerning the credibility of witness Linda James in other proceedings is misconduct requiring dismissal of the indictment.[5] At oral argument, defendants urged the court to equate the apparent failure of the prosecutor to inform the Grand Jury of these matters with a deliberate presentation of perjured testimony, an equation this court will not make under the circumstances of this case. Furthermore, defendants conceded at oral argument that dismissal of this indictment because of this apparent failure can be justified only under the cumulative effect standard set forth in *United States v. Samango.*

The government's entire response to this portion of the motion is to refer the court to the court's ruling at pages 43-48 of its Decision and Order Re Defense Motion for Disclosure of Grand Jury Transcripts and Minutes and to assert:

> Even assuming that this allegation [sic] regarding Richard J. Ofshe and Linda James are true, and the government does not contend they are, the showing is insufficient to satisfy the showing of flagrant misconduct sufficient to override the independent judgment of the grand jury which heard substantial other evidence of guilt during its lengthy investigation.

With regard to Richard Ofshe, defendants renew their claim in the face of the court's previous conclusion: "The

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[5] Defendants have dropped their claim that the prosecutor committed misconduct by failing to present to the grand jury affidavits of Lee Stewart Coleman, M.D., Jack D. Douglas, Ph.D., Armand L. Mauss, Ph.D., and George Nash, Ph.D., which affidavits are severely critical of certain sociological studies, conclusions and publications concerning Synanon prepared by Ofshe and assert generally that he is prejudiced and biased against Synanon.

court is persuaded that the allegations concerning Ofshe's prejudice do not suffice to require disclosure of any Grand Jury transcripts. They do not case [sic] the serious doubts on his credibility such as was the case in *Samango*." Defendants argue:

> Ofshe had a multi-million dollar claim pending against Synanon and several of the defendants here. The destruction of evidence was among the central issues in that litigation. Moreover, Ofshe was not coming to the Grand Jury as a witness independent of the Government, since the prosecutor had shared Grand Jury material with him and employed him as a consultant. Thus, Ofshe was both personally biased and an arm of the prosecutor.
>
> . . .
>
> Additionally, wholly apart from the questions relating to Mr. Ofshe's personal credibility, the principle that the grand jury must be independent is violated when a person working for the prosecutor is placed on the stand as a witness, at least when it is not revealed that the witness is dependent on the government for considerable financial support. By using a government consultant as a witness without revealing his employment with the Government the prosecutor deceives the grand jury and turns it, unwittingly, into an arm of the government.

While this court is of the opinion that the Grand Jury should have been informed of Dr. Ofshe's involvement as a civil litigant with Synanon and some of the defendants herein, the court remains persuaded that no prosecutorial misconduct results from this lapse, especially under a cumulative effect standard. Dr. Ofshe's potential bias does not constitute evidence casting serious doubts on the credibility of Dr. Ofshe as a witness. Defendants' assertion that the Grand Jury was not aware during Dr. Ofshe's second appearance before it that he was assisting the prosecutor as an expert in the analysis of

certain tape recordings, *see* Order Re Motion to Dismiss for Violation of Rule 6(e), Fed. R. Crim. P., is pure speculation.

The arguments made by defendants concerning the credibility of Linda James constitute, in the court's opinion, an exaggeration of the record. In the Decision and Order Re Defense Motion for Disclosure of Grand Jury Transcripts and Minutes at pages 43-46, the following is recited:

> In the Declaration of Thomas J. Nolan, it is averred in pertinent part:
>
> C. *The 1984 Los Angeles County, California Indictments.*
>
> 9. On June 21, 1984, thirteen current and former residents of Synanon were indicted by the Los Angeles County Grand Jury on charges of preparing false evidence, offering false evidence, conspiracy to obstruct justice, and perjury. Eight of the nine defendants in the current proceedings were indicted by the Los Angeles County Grand Jury. Of the persons presently indicted, only David R. Benjamin was not indicted in Los Angeles.
>
> 10. Due to numerous defects on the face of the Indictment, the Los Angeles defendants filed a Demurrer on October 19, 1984. Examples of defects in the Indictment included charging perjury for statements which were simply not made, charging a witness for an act for which she had been granted immunity, and misleading the Grand Jury about the applicable statute of limitations. This Demurrer was never responded to by the prosecution. Instead, on December 28, 1984, the Honorable Robert Devich, Judge of the Los Angeles Superior Court (now an Associate Justice on California's Second District Court

> of Appeal), dismissed the Indictment against all thirteen individuals at the request of the District Attorney's office, which wrote in a letter dated December 19, 1984, that it had developed further evidence and that, 'This independent evidence corroborated some Grand Jury witnesses but cast serious doubts on the credibility of other key witnesses including some current Synanon members.' In a later letter, dated November 18, 1985, the Los Angeles District Attorney revealed that at least some of the 'key witnesses' referred to were Linda James and Jay Nolan. Attached hereto as Exhibits "O" and "P" are true and correct copies of correspondence authored by the Los Angeles County District Attorney's office, dated December 19, 1984 and November 18, 1985, respectively.

Defendants assert that it is known that Linda James testified before the Washington, D.C. Grand Jury but that it is not known whether Jay Nolan testified. They contend that "it is imperative that the defendants review the Grand Jury Transcripts of the testimony of Linda James (and Jay Nolan, if any), to see if grounds for dismissal exist based upon the failure to provide evidence negating guilt."

Defendants' Exhibit P states: "This independent evidence consists of the affidavits of Linda James, dated September 19, 1984, and the thirty-three affidavits pertaining to Jay Nolan. These affidavits were offered by defense counsel at the probation violation hearing of Charles E. Dederich." This court has not been provided a copy of the dismissed indictment or the affidavits referred to in Exhibit P. While defendants assert that "[t]he Los Angeles indictments and the present action are based on some of the same factors, i.e., alleged destruction of documents and obstruction of justice," the court has no way of gaug-

ing whether or not the testimony of these witnesses was of the same events in both grand jury proceedings or what caused the Los Angeles District Attorney's Office to question James' and Nolan's credibility. Furthermore, defendants' Exhibit O states in its entirety:

> The District Attorney's Office intends to move to dismiss Indictment A 754010 (eight counts) in the interest of justice pursuant to Penal Code Section 1385. This motion will be made on the ground that the Indictment has been superseded by a twelve-count felony complaint, filed in the Los Angeles Municipal Court. The Indictment was the result of Grand Jury hearings concerning the evidence available at that time.
>
> After the Grand Jury returned the Indictment on June 25, 1984, the District Attorney's Office continued the investigation and further developed the evidence produced at the Grand Jury Hearing. This independent evidence corroborated ~~some~~ Grand Jury witnesses but cast serious doubts on the credibility of other key witnesses, including some current Synanon members. The continuing investigation also revealed a much clearer view of plausible defense arguments by some indictees. Based on our reevaluation of the evidence and plausible defenses, we must conclude that the evidence does not warrant continued prosecution under the indictment.
>
> It is the position of the District Attorney's Office that all substantial allegations of wrongdoing raised by the Grand Jury investigation will be fully litigated by the superseding complaint and that all major participants in the alleged wrongdoing have been ascertained. Finally, all indications are that post-indictment preliminary hearings are desired, at least by

> some of the current defendants, pursuant to their rights accorded by *People v. Hawkins*, 22 Cal.3d 584. Therefore, the procedure outlined above seems to be truly in the interest of justice.

The court has now been provided with a copy of Linda James' affidavit which the district attorney referred to as the independent evidence casting serious doubts on her credibility. This affidavit, submitted as defendants' Exhibit BB, avers in pertinent part:

> 2. I was a resident of Synanon from October 3, 1967 to February 23, 1981. On June 12, 1984 I was called as a witness before the Los Angeles Grand Jury. During my testimony, I was asked questions regarding Charles E. Dederich and events which may have taken place after the time Mr. Dederich was placed on probation in what has been referred to as the 'rattle snake case.' At the time I was asked questions, I did not know exactly when Mr. Dederich was placed on probation. Nor did I fully understand what the term 'probation' meant in the context of the questions asked of me during my testimony. This declaration should clarify my testimony of June 12, 1984 before the Los Angeles Grand Jury.
>
> 3. After Charles E. Dederich was arrested in December, 1978, there were numerous changes in the manner in which he conducted himself in Synanon. He did not participate in many Synanon Games, nor was he regularly heard on the Wire, which is Synanon's internal radio-like communications network. In my experience, residents of Synanon were very aware of these changes in Mr. Dederich's actions. It would have been unusual for Mr. Dederich to participate in a Synanon Game or speak over the Wire after December, 1978.
>
> 4. I recently learned that Mr. Dederich was placed on probation in September, 1980, which is only five months before I left Synanon. With this new in-

formation in mind, and with an opportunity to review certain documents in my possession, I have additional information regarding the date on which I heard Mr. Dederich live on the Wire. I heard Mr. Dederich live on the Wire on February 10, 1980.

5. I was asked, during my testimony before the Los Angeles Grand Jury, whether or not certain other events involving the Synanon Game occurred while Mr. Dederich was on probation. My testimony on pages 595-596 of the transcript of testimony before the Los Angeles Grand Jury is attached as Exhibit "A" to this declaration. To the best of my recollection, I cannot pinpoint the exact period of time during which these situations occurred. Knowing that Mr. Dederich's actions within Synanon had changed after his arrest in December, 1978 (as described in paragraph 3) the situations described on pages 595-596 may have occurred before September, 1980, and not during the last five months that I was a resident in Synanon.

6. Had I been informed of the precise date Mr. Dederich was placed on probation before being asked the questions by the Deputy District Attorney, this confusion would not have occurred. I am not a lawyer, not was I ever trained as a lawyer. The terms regarding probation are not familiar to me.

Defendants parlay this affidavit into a serious doubt on the part of the district attorney as to all of her testimony, an inference which is not supportable from the documents before this court. The court is of the opinion that any doubts as to Linda James' credibility which the prosecutor herein may have had certainly do not rise to the level of misconduct if not disclosed and certainly do not necessitate dismissal of this indictment if disclosure was in fact not made.

4. *Derogatory References to the Synanon Lifestyle, Biasing the Grand Jury and Violating Defendants' First Amendment Rights of Freedom of Religion, Association and Expression.*

In this portion of defendants' motion, defendants argue that dismissal of the indictment is required because the prosecutor's questions to witnesses before the Grand Jury concerning Synanon's lifestyle, religion and internal affairs biased the Grand Jury, thereby compromising its impartiality, and violated the First Amendment rights of Synanon and its members to freedom of religion, association and expression.

In arguing that this occurred during the Grand Jury proceedings leading to this indictment, defendants refer the court to paragraph 2 of Count One of the indictment:

> 2. It was part of the conspiracy that the defendants and unindicted co-conspirators who were and are officials, attorneys and residents of The Synanon Foundation, Inc., later known as The Synanon Church, a corporation incorporated under the laws of the State of California as a nonprofit charitable corporation, sought to conceal and cover-up from agents of state agencies, from the Internal Revenue Service of the U.S. Treasury Department investigating whether the tax-exampt status of The Synanon Foundation, Inc., should be revoked, and from litigants in lawsuits in the courts of the State of California, the District of Columbia, and the courts of the United States in the District of Columbia, conduct and evidence and discussions thereof by Synanon officials, attorneys and residents which was contrary to Synanon's status as a charitable, non-violent, nonprofit foundation, to wit, the inflicting of physical violence by Synanon residents on Synanon's enemies, the acquisition of an arsenal of guns, the 'Holy War', the diversion of Synanon money into private hands,

> salaries, bonuses, Synanon 'Love Matches,' 'Changing Partners' and other activity harmful to Synanon's status as a charitable, non-profit, non-violent foundation.

Defendants also refer the court to the declaration of Yvette Van Dalsem filed in Connection with the Grand Jury discovery motion: "6. While testifying before the Grand Jury, I was asked questions about my former husband and my Synanon Love Match, a religious marriage ceremony." Defendants further state that "[d]efendant Judy [Cecilia Jason] Dederich's Grand Jury testimony is rife with this type of outrageous, prejudicial, and irrelevant inquiry." Defendants then cite three questions of Dederich, in answer to all of which she claimed the Fifth Amendment.

> Q In Formia, Italy while you were there, were there discussions among the group, which consisted of the board of directors of Synanon—discussions of group sex and group marriage?
>
> A I respectfully decline to answer on the grounds of the Fifth Amendment.
>
> Q Were you ever involved in any experiments involving group sex with other people, other than your present or existing spouse at the time?
>
> A I respectfully decline to answer on the grounds of the Fifth Amendment.
>
> . . .
>
> Q At the Synanon Foundation, during the time you've resided there—which has been a substantial amount of time, I understand—was the Dederich family referred to as the Royal Family?
>
> A I respectfully decline to answer on the grounds that my answer may tend to incriminate me.

Defendants contend:

> These questions had no place in the proceedings. The only possible reason for asking these questions was to inflame the grand jury into believing that Jady Dederich and her colleagues are immoral. In addition, the Grand Jury testimony of Steve Simon and Ron Cook contains several more instances of this type of inflammatory and irrelevant examination. *See* Exs. 'D', 'E' and 'W'.
>
> In the questioning of witnesses Ms. Van Dalsem, Miss Dederich, Steven Simon and Ron Cook there was no 'substantial connection' between the subject matter of the investigation and the information of who they were married to, there sexual activities, or the status of the Dederich family in Synanon. Specific inquiries by the Government regarding group sex and group marriage have nothing to do with this Indictment; indeed, 'group sex' and 'group marriages' are totally unrelated to the topics 'Love Matches' and 'Changing Partners' indicated in the Indictment. It is difficult to imagine any questions that could have been more prejudicial.

The government responds that the questions complained of were relevant to the Grand Jury's investigation:

> The questions objected to were about Board Meeting discussions of plans for group marriages and group sex by Synanon residents and whether these board meetings were tape recorded. These questions were highly relevant to the grand jury's investigation because, as demonstrated by the declarations of Bette Fleishman and George Farnsworth, such discussions took place in Formia, Italy, the meetings were tape recorded and later the tape recordings were concealed or destroyed on instructions of some of these defendants. . . .

> The defendants also object to questions asked of Ronald V. Cook, Yvette Van Dalsen, and Steven Simon regarding the nature of their 'marriage' to several of their claimed wives. The relevance of these questions to the grand jury investigation is two fold. Part of the damaging documents and tape recordings which the indictment alleges were concealed from litigants and investigators dealt with subjects pertaining to the Synanon 'Love Match' and 'Changing Partners.' This aspect of the so-called Synanon life-style because [sic] relevant to the investigation because the defendants perceived it to be damaging. The grand jury was entitled to inquire why and how. These questions are also relevant because the grand jury was entitled to learn whether the marital privileges claimed by several of the grand jury witnesses were in fact based on legally cognizable marriages and whether the limited relationship called the Synanon 'Love Match' entitled the witnesses to claim marital privilege.

At oral argument, defendants contended that the questions concerning "love matches" and sexual activities, etc., had no legal relevance to the grand Jury's investigation. In so arguing, defendants referred the court to 26 U.S.C. § 501(c)(3)'s definition of a tax exempt organization, which definition includes "[c]orporations and any . . . foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . ., no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office." Defendants assert that "love matches," etc. could not in any respect affect Synanon's tax exempt organization status under Section 501(c)(3). Therefore, the destruction of

documents or tapes concerning "love matches" by persons acting under the erroneous impression that these documents and tapes did affect Synanon's tax exempt status is not criminal because the destruction is not unlawful. Consequently, defendants contend that any questions in this area by the prosecutor were irrelevant to the Grand Jury's investigation. The analysis presented by defendants at oral argument is a slightly expanded version of the argument presented in footnote 22 of defendants' opening brief. In footnote 22, defendants refer the court to the separate opinion of Justice Mack of the District of Columbia Court of Appeals in which Justice Mack concluded that the commercial activity and deviant sexual practices of Synanon were irrelevant to the issues raised by the complaint in *Synanon Foundation, Inc. v. Bernstein*, and that the nonproduction and/or destruction of documents germane to these two issues worked no prejudice to the defendants' case therein. *See Synanon Foundation, Inc. v. Bernstein*, 503 A.2d 1254 (D.C. App. 1986). Footnote 22 further stated:

> In *Synanon v. United States of America* the central issue was Synanon's entitlement to its tax exemption. Arguably, facts concerning lifestyle may be related to certain narrow portions of that case. But questions regarding 'group sex,' such as that [sic] posed by Goodwin, were outside the scope of that tax dispute. Even under the most liberal view of relevancy, it is incomprehensible to see how Goodwin's baseless questions to Cecelia Jason Dederich and Ronald V. Cook could serve any purpose but to inflame and prejudice the Grand Jury.

The court cannot agree in the context of this motion. The Grand Jury was investigating charges of destruction of documents and tapes and perjury with respect to that destruction. The materiality of these documents and tapes and Synanon's lifestyle including those concerning "love matches" was, as the court understands it, an issue in *The Synanon Church v. United States* given the

United States' reliance upon *Bob Jones University v. United States*, 461 U.S. 574 (1983). And, from the indictment herein, the charges arising from *Synanon Foundation, Inc. v. Bernstein* involve alleged instances of perjury and false representations.

There is no question that a Grand Jury witness does not lose the right to refuse to answer a question on the ground that to do so would violate his First Amendment rights and that the decision whether the witness can be compelled to answer requires balancing the relevancy of the question to the Grand Jury's investigation with the First Amendment right claimed. *Bursey v. United States*, 466 F.2d 1059, 1081-1088 (9th Cir. 1972); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also Ealy v. Littlejohn*, 589 F.2d 219, 226-230 (5th Cir. 1978).

Here, however, there is no indication from any of the transcripts provided to the court that a witness before this Grand Jury ever refused to answer a question on the ground that answering it would violate First Amendment rights. Nor is there any reference to this occurring made by any of the defendants herein or by reference to a motion to compel based on the assertion of First Amendment rights. Defendants argue:

> The First Amendment rights that are at issue, it is important to note, are not simply those of the grand jury witnesses. Rather, the entire group's First Amendment rights are at stake. A witness cannot waive these constitutional rights merely by answering the question posed to him. When the Government uses compulsory process to elicit information about a religious group like Synanon in a grand jury proceeding, the freedoms of association, religion, and expression of the entire group—and certainly of persons later indicted—are threatened, and the Government must therefore be held to a high standard of establishing relevancy.
>
> . . .

> The grand jury proceeding is a unique proceeding. It is not an adversarial setting where a target's rights are protected by his lawyer's timely objections to irrelevant, improper or intrusive questioning by the Government. Generally, witnesses do not object in these proceedings, when their First Amendment rights are infringed. Just as important, the persons whose rights to an unbiased grand jury or whose First Amendment rights are threatened are not present during the grand jury questioning of other witnesses.
>
> . . .

The court cannot agree with defendants' argument in the context of this motion. Defendants would have this court dismiss an indictment on the ground that the prosecutor committed misconduct by asking questions to which a possibly valid First Amendment objection to answering could have been raised, but was not. And while some of these witnesses may have been "lay witnesses," the transcripts provided to the court indicate that most of the witnesses whose testimony is recorded in those transcripts had counsel outside the Grand Jury room and did not hesitate to consult with counsel before answering questions. Defendants do not cite nor can the court locate any authority even discussing dismissal of an indictment under these circumstances. Moreover, the court can locate no authority holding that the prosecutor has any duty to advise a Grand Jury witness concerning the witness's First Amendment rights.

Citing *In re C.B.S., Inc.*, 570 F.Supp. 578 (E.D. La. 1983), *appeal dismissed sub nom. United States v. McKenzie*, 735 F.2d 907 (5th Cir. 1984), defendants contend that "it is clear as a matter of law that the mere failure to raise a constitutional objection does not constitute a waiver, especially under circumstances where there was no clear understanding of that right [and that i]t is difficult to imagine circumstances *less* con-

ducive to a voluntary and intelligent relinquishment of a known right than the questioning of a lay witness before a grand jury." Again, however, defendants are seeking dismissal based on the prosecutor's actions, which may or may not have infringed First Amendment rights. This is simply too speculative to require dismissal on the ground of prosecutorial misconduct.

5. *Introduction of Irrelevant, False and Highly Prejudicial Evidence.*

The primary basis for this portion of defendants' motion has been disposed of in the court's Order Re Motion for Evidentiary Hearing on Harassment of Witnesses filed August 27, 1986 in which the court held that the testimony of Francis Hertz was not untrue.[6] The court, moreover, does not consider his testimony to be irrelevant or prejudicial. The court is in agreement with the government:

> This testimony, in an investigation dealing with obstruction of justice and the harassment and inflicting of violence on perceived enemies of Synanon, including lawyers, was clearly relevant. Furthermore it was necessary that the grand jury learn of the dangers to witnesses appearing before the grand jury in order to insure that members of the grand jury would scrupulously observe their secrecy obligations.

6. *Abuse of Grand Jury Subpoena Authority.*

Defendants contend that the prosecutor abused the Grand jury's subpoena authority. This contention is based on the facts that Mr. Goodwin interviewed Bette Fleishman and George Farnsworth and subpoenaed cer-

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[6] As a point of clarification, Francis Hertz testified to the Grand Jury on February 14, 1984. The Order Re Motion for Discovery incorrectly states that Hertz testified on October 4, 1983 which is actually the date on which Grand Jury 84-1 was impaneled.

tain documents in their possession prior to the empanelment of the Grand Jury investigating the charges leading to this indictment. Defendants argue that the chronology of events raises several relevant issues in connection with this motion:

> First, under what authority did Mr. Goodwin subpoena the Fleishman and Farnsworth documents? This question has never been answered. The only certain fact is that it was *not* the authority of the Grand Jury which investigated these defendants and returned this Indictment. Several troubling possibilities exist. The subpoenas may have been issued in some rubber stamp fashion by a sitting grand jury in order to benefit the civil tax investigation, without any relationship to any legitimate grand jury purpose. It may be that a grand jury was convened to look into this case earlier than October of 1983, and that this fact has been deliberately concealed. What is clear is that the situation requires full candor on the part of the Government.
>
> Mr. Goodwin has acknowledged further that his interviews of Fleishman and Farnsworth were conducted in concert with the Tax Division attorneys. If a grand jury was in fact empaneled and looking into this matter, it seems inevitable that the conduct of joint interviews would have led to violations of grand jury secrecy. On the other hand, if no grand jury was investigating the matter, the subpoenas were clearly without any lawful authority. As shown in our moving papers, either of these possibilities may be sufficient in itself to warrant dismissal of the Indictment, and further inquiry is clearly warranted.

In opposition to this argument, the Declaration of Guy Goodwin avers in pertinent part:

> 4. At no time was any grand jury information or materials, including transcripts of grand jury testi-

mony or documents received by grand jury subpoena or any other information, disclosed to attorneys Thomas Lawler and Francis Hertz of the Tax Division of the United States Department of Justice or to any other person not permitted by Rule 6(e), F.R.Cr.P. or court order to obtain them.

5. During interviews of Bette Fleishman in June 1983 by attorneys Thomas Lawler, Francis Hertz and declarant, no grand jury matter was disclosed by declarant because at that time no grand jury was yet investigating this matter. At the time of interviews of George Farnsworth by attorneys Thomas Lawler, Francis Hertz and declarant, documents obtained from Bette Fleishman by grand jury subpoena had not been reviewed by declarant and no other evidence had been obtained by the grand jury; therefore no grand jury material was disclosed during the interviews of George Farnsworth.

The court is persuaded from its research and the record herein that no abuse of the Grand Jury's subpoena authority has occurred. As explained in *United States v. Kleen Laundry & Dry Cleaners, Inc.*, 381 F.Supp. 519, 522-523 (E.D.N.Y. 1974):

> Here defendants seek to assert not so much their personal rights as the right of the grand jury to control the issuance of its subpoenas. They do not allege prejudice to their position by the actions of the government since it is obvious that had the United States Attorney requested the grand jury's advice on issuance of the subpoena, *pro forma* consent would have followed. Rather, they argue that the use of the power on behalf of, but without direction from, a grand jury results in an invalid indictment which should be dismissed and in illegally obtained evidence which should be suppressed. They are wrong.

Though the grand jury may request evidence, the function of issuing process to obtain it belongs to another. It is the prosecutor who has the initiative and power by subpoena to bring proof to the courthouse. . . .

Rule 17 of the Federal Rules of Criminal Procedure, which governs the issuance of subpoenas in all criminal proceedings in general and in grand jury proceedings in particular, lends statutory authority to the prosecutor's role. . . . Under this rule, the criminal subpoena is issued by the court clerk

> 'signed and sealed but otherwise in blank to a *party* requesting it, who shall fill in the blanks before it is served.' (Emphasis added.)

The 'party' referred to in the context of the instant case is the United States which is, of course, represented by the United States Attorney. . . . That a different grand jury from the one which subpoenas the evidence is presented with that evidence is of little import. This procedure is common. . . . By a parity of reasoning, the absence of a sitting grand jury at the time of issuance is not disturbing since the return date was set for a day when the jurors were normally in session.

. . .

Defendants further argue that the materials obtained by the subpoena were not immediately turned over to any sitting grand jury but instead were illegally used by the Federal Bureau of Investigation and the United States Attorney for further investigation. This argument must also fail. It is settled procedure for the government to analyze evidentiary data for the purpose of reporting back to the grand jury. . . .

The court has the power to curb any abuse of grand jury process by the prosecutor. The Government

> may not, for example, use the grand jury as a discovery device to prepare other cases. . . .

Defendants' contention that these documents were subpoenaed in order to provide them to civil attorneys from the Tax Division involved in litigating *The Synanon Church v. United States* has flatly and repeatedly been denied. *See also* Decision and Order Re Defense Motion for Disclosure of Grand Jury Transcripts and Minutes.

ACCORDINGLY, IT IS ORDERED that, except as to defendant Sybil Schiff, defendants' Motion for Dismissal of Indictment Due to Prosecutorial Misconduct is denied.

DATED: December 2, 1986.

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR-F-86-1 REC

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAVID BENJAMIN, *et al.*,
Defendants.

ORDER RE MOTION TO DISMISS FOR VIOLATION OF RULE 6(e), FED. R. CRIM. P.

[Filed Nov. 4, 1986]

On September 30, 1986, the court heard defendants' Motion to Dismiss for Violation of Rule 6(e), Fed. R. Crim. P. Upon due consideration of the written and oral arguments of the parties and the record herein, the court denies defendants' motion for the reasons set forth herein.

By this motion, defendants move the court for an order dismissing the indictment against them on the ground that disclosure of Grand Jury materials to Richard Ofshe was a violation of Rule 6(e), Federal Rules of Criminal Procedure.

This motion is made despite the fact that on August 2, 1984, the Honorable Aubrey E. Robinson, Jr., Chief Judge of the United States District Court for the Dis-

trict of Columbia, issued a disclosure order pursuant to application therefor filed by Guy L. Goodwin, Attorney with the Criminal Division, United States Department of Justice assigned to conduct the Grand Jury investigation and to prosecute this action. The application sought an order pursuant to Rule 6(e)(3)(C)(i) and Rule 6(e)(3)(D) "to disclose to an expert witness employed by the United States in this matter, certain documents obtained by grand jury subpoena." The application further stated:

> 1. That the grand jury is engaged in an investigation of violations of federal criminal statutes arising from the destruction of documents, tapes, recordings and other evidence by individuals associated with The Synanon Foundation, Inc., also known as The Synanon Church (hereafter, Synanon), and the creation of false and altered documents to conceal the destruction of evidence in anticipation of demands for such evidence in litigation and federal agency proceedings.
>
> 2. That the grand jury has obtained by subpoena from third parties a large quantity of documents and tape recordings which are represented to have originated in Synanon; that the federal investigative agency involved in the investigation lacks familiarity with Synanon records and the voices appearing on Synanon tape recordings and is unable to make the required analysis of the documents and recordings to assist the grand jury.
>
> 3. That the government has employed an expert, Richard J. Ofshe, PhD. who has devoted over ten years to the study of Synanon and who is knowledgeable about its records, tape recordings, and the identities and voices of its officials; that this expert has previously assisted the grand jury in this investigation by giving testimony but has not been

provided access to documents subpoenaed by the grand jury; that the completion of the grand jury investigation will require an analysis of the documents and recordings by the expert employed by the government;

4. That the federal grand jury investigation is a judicial proceeding as contemplated in Rule 6(e)(3)(c)(i), F.R. Cr. P. See *Doe v. Rosenberry*, 255 F.2d 118 (2nd Cir. 1958); that the documents and recordings subpoenaed by the grand jury were created and had a purpose independent of the grand jury and as such do not reveal the direction and strategy of the grand jury investigation. *SEC v. Dresser Industries*, 628 F.2d 1368, 1382-83 (D.C. Cir. 1980); *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 869 (D.C. Cir. 1981); that there exists a compelling and particularized need as required in *United States v. Proctor & Gamble*, 356 U.S. 677 (1958), for disclosure of the documents and recordings subpoenaed by the grand jury to the government's expert, Richard J. Ofshe, in order to assist the federal grand jury; that disclosure of the documents and recordings will be restricted to the government expert's sole use in the grand jury investigation and for no other purpose, and the government's expert will not divulge the documents and recordings to any other persons.

WHEREFORE the government request that the Court issue an ex parte order pursuant to Rule 6(e)(3)(c)(i), and 6(e)(3)(D), F.R. Cr. P., authorizing the disclosure of documents and recordings subpoenaed by the grand jury to the government's expert, Richard J. Ofshe, for his use in assisting the grand jury investigation and for no other purpose.

The disclosure order issued by Judge Robinson states in pertinent part:

After being advised in the premises the Court finds:

1. That the grand jury is engaged in an investigation of violations of federal criminal statutes arising from the destruction of documents, tapes, recordings and other evidence by individuals associated with The Synanon Foundation, Inc., also known as The Synanon Church (hereafter, Synanon), and the creation of false and altered documents to conceal the destruction of evidence in anticipation of demands for such evidence in litigation and federal agency proceedings.

2. That the federal grand jury investigation is a judicial proceeding as contemplated in Rule 6(e)(3)(c)(i), F.R. Cr. P. See *Soe v. Rosenberry*, 255 F.2d 118 (2nd Cir. 1958); that the documents and recordings subpoenaed by the grand jury were created and had a purpose independent of the grand jury and as such do not reveal the direction and strategy of the grand jury investigation. *SEC v. Dresser Industries*, 628 F.2d 1368, 1382-83 (D.C. Cir. 1980); *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 869 (D.C. Cir. 1981); that there exists a compelling and particularized need as required in *United States v. Proctor & Gamble*, 356 U.S. 677 (1958), for disclosure of the documents and recordings subpoenaed by the grand jury to the government's expert, Richard J. Ofshe, in order to assist the federal grand jury; that disclosure of the documents and recordings will be restricted to the government expert's sole use in the grand jury investigation and for no other purpose, and the government's expert will not divulge the documents and recordings to any other persons.

IT IS THEREFORE ORDERED that documents and tape recordings obtained by the 84-1 Grand Jury in the investigation of the destruction of documents

> and tape recordings of Synanon and the creation of false and altered documents by officials and individuals associated with Synanon may be disclosed to Richard J. Ofshe in order that he may assist the federal grand jury in that investigation; and it is further ORDERED that the documents and recordings disclosed pursuant to this order will be used only for the purpose of assisting the federal grand jury and the United States Attorney in the investigation and for no other purpose; and it is further ORDERED that the said Richard J. Ofshe will not disclose the documents and tape recordings to any other persons.

According to paragraph 4 of the Declaration of Guy L. Goodwin filed in connection with the government's opposition to this motion:

> 4. Several months thereafter, in approximately October 1984, declarant made available to Dr. Ofshe for review a number of tape recordings created by the Synanon Foundation, Inc., which consisted of tape recordings made during 1977 of the Synanon 'Morning Court' sessions conducted by the Founder and Chairman of the Board, Charles E. Dederich. These tape recordings did not in any way reflect the content of proceedings in the grand jury in 1984 through 1985. No other grand jury documents of any kind were made available to Dr. Ofshe. Dr. Ofshe did not receive any grand jury transcripts, names of grand jury witnesses, or memoranda summarizing or describing anything which occurred in the grand jury.

Defendants argue that, notwithstanding Judge Robinson's order, Rule 6(e) does not authorize disclosure of subpoenaed materials involving matters before the Grand Jury at the request of the prosecution to assist in its investigation. Defendants further contend that the concealment by the prosecutor of material facts about Ofshe

vitiates any order authorizing disclosure of Grand Jury material.[1]

A. *Disclosure Under Rule 6(e) to Ofshe.*

Citing *United States v. Tager*, 638 F.2d 167, 168-171 (10th Cir. 1980), defendants argue that dismissal of this indictment is required as a matter of law. In *Tager*, the government moved under Rule 6(e)(3)(C)(i) for disclosure of grand jury transcripts to an investigator employed by the Insurance Crime Prevention Institute to enable him further to assist in the grand jury investigation. The Tenth Circuit held that disclosure of the grand jury materials to the investigator was not within the authority provided by Rule 6(e)(3)(C)(i). In so holding, the Tenth Circuit concluded that grand jury proceedings are not "preliminarily to or in connection with a judicial proceeding." The Tenth Circuit stated at 170:

> In addition to its lack of case support, the government's position is further undermined by the structure of Rule 6(e). The need for assistance in federal investigations which is highlighted by the issue before us was not a matter within the contemplation of subsection (C)(i). The need for assistance is addressed by subsection (A)(ii). This subsection authorizes disclosure to 'such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce

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[1] From certain arguments in the defendants' briefs, the court and the government obtained the impression that defendants were predicating this motion on the ground that Ofshe subsequently violated the grand jury's secrecy. At oral argument, however, defendants assured the court that the grounds for this motion are that disclosure to Ofshe was improper as a matter of law and that Judge Robinson's order is vitiated by the government's concealment of certain material facts concerning Ofshe. Accordingly, the court does not address anything other than these issues and considers any other issues waived.

> federal criminal law.' Moreover, the drafters of (A)(ii) considered whether the assistance of private persons like Mr. House should be included. They decided against such inclusion by limiting (A)(ii) to 'government personnel.' . . .
>
> Subsection (C)(ii) contemplates proceedings other than the grand jury proceeding itself, otherwise there is little purpose for the other subsections. As previously discussed, some courts have authorized disclosures in connection with a grand jury proceeding under subsection (C)(i). But these were not for the purpose of assisting the ongoing grand jury investigation, which is the province of subsection (A)(ii); they were for witnesses of their own testimony to prevent unfairness which would otherwise have occurred. We must hold that subsection (C)(i) 'is not designed nor has it been used in the past as a source of authority for a court to order disclosure to assist with the present grand jury proceedings.'

The court concludes that *Tager* is not binding upon it and the court does not agree with its *per se* result.[2] In the court's opinion, the Ninth Circuit's opinion in *United States v. Mayes*, 670 F.2d 126, 129 (9th Cir. 1982) does not compel this court to follow *Tager*. In *Mayes*, the Ninth Circuit rejected the defendant's argument that the indictment against him should be dismissed because Dr. Chadwick, an expert witness before the grand jury, examined secret grand jury materials:

> A number of public policy concerns underlie the need for grand jury secrecy. Disclosure of certain grand jury materials to Dr. Chadwick to enable him to

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[2] Because the court concludes that *Tager* does not apply herein in any event, it is unnecessary for the court to resolve a threshold issue to Tager's application concerning whether or not the documents and tape recordings ordered disclosed to Dr. Ofshe were grand jury materials and the court expresses no opinion with regard to this issue.

express his expert opinion concerning the cause of the child's death to the grand jury in no way contravened any of these policies. The government could have familiarized Dr. Chadwick with the facts surrounding the child's death by posing a complex hypothetical question. In the circumstances presented, this approach would have been unduly cumbersome. The most expeditious and reliable way for Dr. Chadwick to prepare for his expert testimony was to review transcripts of the testimony of prior grand jury witnesses and examine other evidence presented to the grand jury. Since he examined these materials under court supervision, sufficient safeguards existed to prevent abuse of the procedure.

Additionally, Fed. R. Crim. P. 6(e)(3)(C)(i) provides that a court may order disclosure of grand jury materials 'preliminarily to or in connection with a judicial proceeding.' We need not decide whether a grand jury proceeding is 'a judicial proceeding' under Rule 6(e), as it seems clear that grand jury proceedings are at least preliminary to a judicial proceeding. *United States v. Stanford*, 589 F.2d 285, 292 (7th Cir. 1978).[2] We conclude that in the circumstances presented, the examination by Dr. Chadwick of grand jury materials was proper and the district court did not abuse its discretion by authorizing such disclosure under Rule 6(e).

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[2] Citing *United States v. Tager*, 638 F.2d 167 (10th Cir. 1980), Mayes maintains that disclosure, under judicial supervision, of certain grand jury materials to Dr. Chadwick was improper under Rule 6(e)(3)(C)(i). *Tager* involved the propriety of a subsection (C)(i) disclosure of grand jury materials to a private, nongovernmental investigator to enable him further to assist governmental attorneys in an ongoing investigation. The court noted that a governmental attorney's need for assistance in the enforcement of federal criminal law

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is addressed, not by subsection (C)(i), but by subsection (A)(ii) of Rule 6(e) which limits disclosure to 'government personnel.' 638 F.2d at 170. Without expressing a view as to the correctness of the *Tager* decision, we note that Dr. Chadwick was not called upon to assist governmental attorneys as a private investigator in an ongoing investigation, but was asked to express his expert medical opinion based in part on certain evidence previously presented to the grand jury. As such Dr. Chadwick's expert testimony before the grand jury did not come within the provisions of subsection (A)(ii).

Moreover, the court does not agree with *Tager*'s analysis. To the extent the Tenth Circuit posits that the disclosure exceptions set forth in Rule 6(e)(3)(C) are governed by or limited by the disclosure exceptions set forth in Rule 6(e)(3)(A), the court does not read the rule that narrowly. Rule 6(e)(3)(C) starts out: "Disclosure otherwise prohibited by this rule of matters occurring before the grand jury *may also be made . . .*" (emphasis added). The Ninth Circuit, moreover, in *Mayes, supra* relied on *United States v. Stanford*, 589 F.2d 285, 292 (7th Cir. 1978), a case distinguished in *Tager*, in holding that grand jury proceedings are preliminary to a judicial proceeding. The court also thinks *Tager* is much too narrow in its implications. There undoubtedly will be situations where the prosecutor must have the assistance of an expert and none can be found in the ranks of the government. The court finds completely exaggerated defendants' argument that the failure to follow *Tager* will result in government disclosure of grand jury material to anyone the government chooses, thereby allowing the government to "round up a posse." Interposed between the government and the posse is the district court. Finally, the purpose of the disclosure to Dr. Ofshe is, in the court's opinion, very similar to the purpose of the disclosure to Dr. Chadwick in *Mayes*.

B. *Concealment of Material Facts.*

Defendants further argue that even if the court finds *Tager* to be inapplicable, the failure of the prosecution to disclose to Judge Robinson the fact that Dr. Ofshe was involved in civil litigation with members of Synanon requires dismissal of the indictment or, at a minimum, an evidentiary hearing in which the facts surrounding the government's procurement of the order can be more thoroughly explored. Defendants contend that this concealment vitiates Judge Robinson's order because "[h]ad the District Court been aware of these facts, we have little doubt that it would have declined to authorize disclosure."

Dr. Ofshe is or was a defendant and cross-complainant in *Burke, et al. v. Reader's Digest Association, Inc., et al.*, No. 108266, commenced in the Marin County Superior Court at some date and for some purpose not clearly disclosed herein but apparently for damages for libel. The plaintiffs in this civil action include Cecilia Jason Dederich. Ofshe filed on November 8, 1983 a cross-complaint for damages against a number of entities and individuals, including Cecilia Jason Dederich, Daniel Garrett, Phillip and Miriam Bourdette, David Benjamin, and Steven Simon, alleging causes of action for malicious prosecution, abuse of process (which includes an allegation of the systematic destruction or removal of evidence including tape recordings and documents), and intentional infiiction of emotional distress. On July 23, 1984, Ofshe filed a First Amended Cross-Complaint for damages adding a cause of action for intentional spoliation of evidence.

In its opposing brief, the government nowhere stated whether or not it was aware of Dr. Ofshe's involvement as a civil litigant. During oral argument, however, it was made clear that Guy Goodwin was aware of this prior to submission of the application to Judge Robinson.

Goodwin also stated at oral argument that it was his belief that he informed Judge Robinson of the civil litigation during a chambers conference. Absent a declaration from Judge Robinson, the court cannot accept Goodwin's recollection and must assume for the purposes of this portion of the motion that Judge Robinson in fact was unaware of Ofshe's status as a civil litigant against some of the defendants herein.

Defendants argue that the concealment "is fully as reprehensible as the allegations of fraud and obstruction that it has leveled against the defendants." Citing *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1391-1392 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984), *United States v. Cederquist*, 641 F.2d 1347, 1351-1353 (9th Cir. 1981), and *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1979), defendants further assert that "[u]nder well-established principles, such concealment would constitute the sort of misconduct warranting dismissal wholly apart from the effect that the disclosures may have had on the Grand Jury." The cited portions of these decisions involve, however, the question whether dismissal of an indictment on constitutional grounds because prosecutorial misconduct has undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it, requiring an inquiry as to the impact of the misconduct on the grand jury's impartiality. Defendants cite no authority that the prosecutor's failure to inform the district court of a potential conflict in the application for a disclosure order is prosecutorial misconduct, or requires vitiation of the disclosure order, or requires dismissal of the indictment and the court's research has failed to locate any such decisions.

Defendants do argue: "[T]he appointment of Ofshe as the Grand Jury's *agent* [emphasis added] compromised the independence and impartiality of the Grand Jury.

While the Government's use of Ofshe as a witness may simply have reflected poor judgment, his elevation to the status of court-agent was more pernicious. It conferred upon him an apparent authority and credibility wholly at odds with his role as a bitter civil adversary of some of these defendants." The decisions upon which defendants rely, however, are not on point. Thus, in *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977), the district court, applying a *per se* rule, dismissed the indictment because a former CAB official who had passed upon many of the matters under investigation in a grand jury investigation of violations of the Sherman Act, left the employ of the CAB and was employed by the Antitrust Division, was present in the grand jury room as an "observer." The district court concluded this was the unlawful participation by an unauthorized person before a grand jury. Here, Ofshe was authorized by court order. In *In re Grand Jury Subpoenas*, 573 F.2d 936 (6th Cir. 1977), *vacated on other jurisdictional grounds en banc*, 584 F.2d 1366 (6th Cir. 1978), *cert. denied sub nom. General Motors Corporation v. United States*, 440 U.S. 934 (1979), the Sixth Circuit ordered the district court to terminate a grand jury investigation as invalid on the ground that the Attorney General's appointment of an IRS lawyer to conduct a grand jury investigation of an auto manufacturer concerning alleged income tax evasion was unethical under the ABA Code of Professional Responsibility since there was an appearance of impropriety by reason of the IRS lawyer's prior connection with an IRS investigation of the manufacturer's income tax returns and the IRS recommendation, in which he participated, as to the need for a jury investigation. Defendants assert:

> The conflict here was, if anything, more troubling. Ofshe did not have simply a *former* connection with a civil investigation, he was pursuing his civil claims at precisely the *same* time he was serving as a so-

> called 'expert' assisting the Government in its investigation. Moreover, unlike the Government attorneys whose conflict arose solely from their vicarious association with an institutional 'victim,' Ofshe claimed himself to have been personally victimized by these defendants and stood to reap considerable financial rewards if he could prove it. Under the circumstances, his participation in the Grand Jury's investigation was intolerable.

Defendants further argue that even if the concealment was found to be inadvertent, the disclosure order was improper because:

> [T]he proponent of disclosure must demonstrate 'particularized need,' a standard that calls upon the court to weigh carefully the need for disclosure against the risks of violating grand jury secrecy. *See generally, United States v. Proctor & Gamble*, 356 U.S. 677 . . . (1958). We think it self-evident that a court acquainted with all the facts regarding Ofshe and his civil suit would have denied the Government's application for disclosure. Indeed, any other result in these circumstances would be inconceivable in light of the overriding policies favoring grand jury secrecy.

This argument is so speculative to be unanswerable. Both the application and the disclosure order make very clear that the government and the district court were aware of and took steps to preserve the secrecy of the grand jury. While defendants state on page 4 of their opening brief that Judge Robinson "appears to have authorized the disclosure of Grand Jury material to Ofshe without any inkling that he had a . . . clear motive to use the Grand Jury materials for private purposes," the "clear motive" is not particularly compelling:

> The potential harm from the disclosure to Ofshe is readily apparent. By virtue of his parallel civil law-

> suit, Ofshe had a strong personal interest in the outcome of the Grand Jury's deliberations. Quite simply, his effort to recover monetary damages against the defendants on his claims of destruction of evidence would be materially enhanced by the indictment and trial of many of these defendants on similar charges. The criminal trial would not only generate evidence vital to his civil claims, but, if a guilty verdict resulted, might form the basis for a claim of estoppel.
>
> Just as clearly, Ofshe had a compelling incentive to use information acquired in the Grand Jury to further his civil suit. Success in the civil action carried with it the prospect of a very substantial monetary recovery for Ofshe. Conversely, if defendants prevailed in their libel action against him, his professional standing as an 'expert' 'who has devoted over ten years to the study of Synanon,' would plainly suffer.

The court finds these arguments unpersuasive, conclusory and, once again, exaggerated. The court would point out that Judge Braman dismissed *Synanon Foundation, Inc. v. Bernstein*, Civil Action No. 7189-78, District of Columbia Superior Court on October 12, 1983 for abuse of the discovery process and fraud upon the court. On February 9, 1984, Judge Richey dismissed *The Synanon Church v. United States of America*, Civil Action No. 82-2303, District of Columbia District Court for fraud upon the court. The court would further point out that there are no allegations in the indictment concerning *Burke v. Reader's Digest Association, Inc.*

C. *Dismissal as Remedy.*

Although presented in response to defendants' argument in their briefs that Ofshe subsequently violated Rule 6(e), an argument dropped at oral argument, the government, citing *United States v. Stone*, 633 F.2d 1272,

1275 (9th Cir. 1979), contends that the remedy for a violation of Rule 6(e) is not dismissal of an indictment but, rather, a proceeding for contempt.

Defendants respond that *Stone* does not purport to state a general rule governing violations of Rule 6(e). They contend that *Stone* involved a "technical breach" of grand jury secrecy which was made a non-breach by the enactment in 1983 of Rule 6(e)(3)(C)(iii) and that "[m]ore substantial violations of Rule 6 have traditionally been punished with dismissal." With regard to this latter argument, defendants refer the court to Justice Connors concurring opinion in *United States v. Mechanik*, —— U.S. ——, 89 L.Ed.2d 50, 58-60 (1986). *Mechanik* involved a violation of Rule 6(d). Rule 6(d) provides:

> Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

In *Mechanik*, two law enforcement agents testified in tandem before the grand jury in support of a superseding indictment. The defendants did not learn of this until after their trial had commenced. Following conviction, the district court denied their motion to dismiss the superseding indictment on the ground that the two agents' simultaneous presence before the grand jury violated Rule 6(d). The Supreme Court held that however diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's guilty verdict rendered harmless any error in the grand jury's charging decision that may have flowed from the violation. In such a case, the societal costs of retrial are far too substantial to justify setting aside the verdict simply because of an error in

the grand jury proceeding. The cited portion of Justice Connors' concurring opinion merely generally discusses when dismissal of an indictment for violation of Rule 6(d) is appropriate. Rule 6(d) not being involved in this motion, defendants' reliance upon *Mechanik* is of no assistance to the court.

From the court's research, it appears that the general remedy for a Rule 6 disclosure violation is contempt and that, absent a showing of actual prejudice or evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has been entrenched and flagrant in the circuit, a Rule 6(e) violation does not warrant dismissal of an indictment. *See, e.g., United States v. Rosenfeld*, 780 F.2d 10 (3d Cir. 1985); *United States v. Kouba*, 632 F.Supp. 937 (D.N.D. 1986). The court concludes by way of analogy that a similar standard should apply here. While the court strongly advises the prosecution that full disclosure to Judge Robinson on the record would have been the far better course, the court does not believe that the failure to do so warrants dismissal of this indictment.

ACCORDINGLY, IT IS ORDERED that defendants' Motion to Dismiss for Violation of Rule 6(e), Fed. R. Crim. P. is denied.

DATED: November 4th, 1986.

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CR-F-86-1 REC

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAVID BENJAMIN, PHILIP BOURDETTE, MIRIAM CRAWFORD BOURDETTE, CECELIA JASON DEDERICH, DAN L. GARRETT, JR., ELIZABETH MISSAKIAN, SYBIL SCHIFF, STEVEN SIMON, DAN SORKIN,
Defendants.

DECISION AND ORDER RE DEFENSE MOTION FOR DISCLOSURE OF GRAND JURY TRANSCRIPTS AND MINUTES

[Filed May 1, 1986]

On March 17, 1986. the court heard defendants' Motion for Disclosure of Grand Jury Transcripts and Minutes Pursuant to Rule 6(e)(3)(C)(ii), Federal Rules of Criminal Procedure. Upon due consideration of the written and oral arguments of the parties and the record herein, the court enters its order granting the motion in part and denying it in part for the reasons set forth herein.

By this motion, defendants seek an order requiring the Government to disclose the transcripts and minutes of

the Grand Jury proceedings which led to the indictment pursuant to the Rule 6(e)(3)(C)(ii). This rule provides that disclosure of Grand Jury proceedings may be made "when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury . . . ." The anticipated motion to dismiss will be for prosecutorial misconduct.

A defendant has no right to pre-trial discovery of this material, *United States v. Daras*, 462 F.2d 1361, 1362 (9th Cir. 1972), absent a showing of particularized and compelling need for such testimonial records which outweighs the policy of secrecy in Grand Jury proceedings, *Conforte v. C.I.R.*, 682 F.2d 587, 594 (9th Cir. 1982); *Lancey v. United States*, 356 F.2d 407, 412-413 (9th Cir. 1966). " 'Unsubstantiated, speculative assertions of improprieties in the proceedings' do not supply the 'particular need' required to outweigh the policy of grand jury secrecy.' " *United States v. Ferreboeuf*, 632 F.2d 832, 835 (9th Cir. 1980), 450 U.S. 934 (1981). Moreover, "[u]nder *Dennis v. United States* . . ., the standard of particularized need is narrowly applied to insure that only relevant grand jury testimony is made available to defense counsel. *Dennis* does not sanction across the board fishing expeditions by defense counsel who, under the Jencks Act . . . are entitled to the pre-trial statements of Government witnesses at the time of trial." *United States v. Kim*, 577 F.2d 473, 478 (9th Cir. 1978).

Defendants assert a myraid of reasons compelling disclosure of all of the Grand Jury transcripts and proceedings:

A) The Grand Jury transcripts will reveal the extent to which the Government impermissibly used civil proceedings to advance its criminal case and abused the Grand Jury process to benefit its civil action, both of which are grounds for dismissal of the indictment.

B) The Government has apparently violated the general secrecy requirement of Rule 6(e) by hiring Richard Ofshe as a consultant and by sharing materials presented to the Grand Jury with Richard Ofshe.

C) Review of the Grand Jury Transcripts will reveal a systematic pattern of calling witnesses for the sole purpose of forcing them to claim their privilege against self-incrimination, thereby prejudicing the Grand Jury.

D) The Grand Jury transcripts will reveal the Government's affirmative acts involving disregard of its duty of fairness in interrogation of witnesses, prejudicial comments to the Grand Jury, gratuitous remarks to discredit witnesses, and harassment of witnesses.

E) The prosecutor may have breached his duty to the Grand jury by not presenting evidence of the doubtful credibility of certain witnesses and other evidence negating guilt.

F) Defendants need to review the Grand Jury Transcripts to determine the extent the proceedings were tainted by prosecutor Goodwin's assertions that Synanon was a Racketeer-Influenced and Corrupt Organization, and to determine if Goodwin presented exculpatory evidence showing that Synanon was not a RICO type organization.

G) Defendants need to review the Grand Jury transcripts to determine the extent to which the proceedings were tainted by derogatory references to the Synanon ifestyle which were violative of defendants' First Amendment rights of freedom of religion, freedom of association and freedom of expression.

H) Defendants' fears of prosecutorial misconduct are warranted due to prior reported instances of misconduct by the prosecutor.

There are two theories governing dismissal of an indictment for prosecutorial misconduct: constitutional and

supervisory powers. As explained in *United States v. Sears, Roebuck & Co., Inc.*, 719 F.2d 1386, 1391-1392 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079 (1984):

> Because the constitutional doctrine of separation of powers mandates judicial respect for the independence both of the grand jury . . . and of the prosecutor . . ., an indictment may be dismissed only in 'flagrant case[s]' of prosecutorial misconduct. . . .
>
> . . . Dismissal of an indictment is therefore warranted on constitutional grounds if prosecutorial misconduct has undermined the grand jury's ability to make an informed and objective evaluation of the evidence presented to it . . . . The relevant inquiry therefore focuses not on the degree of culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality.

Dismissal based on the exercise of a court's supervisory power serves the purposes of deterring illegality and protecting judicial integrity. *United States v. Payner*, 447 U.S. 727, 735 n.8 (1980), *reh. denied*, 448 U.S. 911 (1980). In deciding whether to invoke the supervisory power to dismiss an indictment, the court considers the egregiousness of the prosecutor's misconduct, the need to discipline the particular prosecutor in light of anoy past misconduct, and the effectiveness of any available sanctions that are less drastic than dismissal of the indictment. *United States v. McClintock*, 748 F.2d 1278, 1284-1285 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 75 (1985). In addition, the cumulative effect of a prosecutor's improprieties before the Grand Jury may require dismissal even though the instances of misconduct, taken separately would not. *United States v. Samango*, 607 F.2d 877, 884 (9th Cir. 1979). However, even when relying upon the cumulative effect, a defendant must demonstrate that the prosecutor engaged in flagrant misconduct that deceived the Grand Jury or significantly impaired its ability to exercise independent

judgment, *United States v. Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), *cert. denied*, 461 U.S. 932 (1983).

The court sets forth the standards governing a dismissal of an indictment on the grounds of prosecutorial misconduct because it concludes that defendants' burden in connection with this motion is to some extent governed by these standards. Thus, in asserting that "grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury," the court is of the opinion that defendants must show that the conduct complained of occurred and that it constitutes prosecutorial misconduct. The court reaches this conclusion in part because of its concern for the protection of witnesses as expressed in the court's Order Re Motion for Discovery, because of defendants' *en masse* approach to the justification for disclosure, because defendants seek disclosure of the entire Grand Jury proceedings, proceedings which endured for two years and involved dozens of witnesses, and because it is apparent to the court from defendants' briefs that they are relying heavily upon *Samango*'s cumulative effect analysis to joustify this complete disclosure even though several of the instances alleged to be prosecutorial misconduct are not. The court emphasizes that it does not mean by this conclusion that defendants' anticipated motion will be meritless. The court is discussing only the standards for disclosure in order to support this anticipated motion.

A. *Improper Commingling of Federal Civil and Criminal Proceedings.*

In August 1982, a civil action for declaratory relief was commenced in the District of Columbia district court in which the Synanon Church challenged the Internal Revenue Service's revocation of the Synanon Church's tax-exempt status. *The Synanon Church v. United States*, No. 82-2303. Representing the United States in this civil

action were Thomas Lawler and Francis Hertz from the Tax Division of the Department of Justice. In arguing that the Grand Jury transcripts will reveal improper commingling, the defendants point to government counsel's misrepresentations regarding the commingling of civil and criminal investigations; the government's utilization of Grand Jury procedures to obtain testimony of witnesses for its civil action; the misuse of the Grand Jury Subpoena to prevent the discovery by the Synanon Church of Bette Fleishman's documents and George Farnsworth's documents in the declaratory relief action; and that government attorneys actively assisted third parties in civil litigation involving the Synanon Church to gain a tactical advantage in the civil tax case and the criminal investigation.

1. *Misrepresentations.*

In arguing that the Government's counsel made misrepresentations concerning the commingling of the civil and criminal investigations, defendants refer the court to partial transcripts of proceedings before the Honorable Charles E. Richey in the declaratory relief action on August 15, 1983 and November 28, 1983 (Defs. Exs. B and C, respectively):

> THE COURT: All right. I have heard you say that many times. Is there any cross-fertilization between this and any ongoing criminal investigation?
>
> MR. LAWLER: No, Your Honor.
>
> THE COURT: You can make that representation?
>
> MR. LAWLER: Yes, your Honor.
>
> THE COURT: Without any fear of contradiction?
>
> MR. LAWLER: This is correct, Your Honor. I would be happy to submit an affidavit, along with my co-counsel, in this case, Mr. Hertz, with respect to those activities. The allegations are frivolous.

MR. WADDEN: Judge, I would be remiss in my duty to my client, if I didn't tell you, and I don't know if the Court wants to go further with this matter, is I have great difficulty understanding Mr. Lawler's statement that there is no inter-fertilization of the criminal and civil case here, because either I do not understand what the word means or I am badly interpreting the facts known to me.

I have tried to talk to Mr. Lawler about this, but Mr. Lawler doesn't have much to say to me. He is very pleasant—I mean about this case he doesn't have much to say to me. I think, Your Honor, the record will show that Mr. Goodwin, who is attached to the Criminal Division of the Department of Justice, I believe this is true, Judge, has participated in the interviews of these witnesses.

THE COURT: That is what the papers say.

MR. WADDEN: —with Mr. Lawler, that the grand jury subpoena was served upon Ms. Fleishman for documents that were discussed so that the grand jury is apparently actively investigating.

We really don't know who is doing what to whom, Judge, in this case, because we don't know how much Lawler and Goodwin are working together, except they appear to be working hand-in-hand, he in a civil case and there is a grand jury sitting in a criminal case, we are told. I can only represent this to you on information and belief.

THE COURT: He says, in response to a direct question from the Court, and he is an officer of the Court, just as you are, that there is no criminal investigation or cross-fertilization going on. That is what he said this morning. I asked him the direct question.

Didn't you?

MR. LAWLER: Your Honor, I said there was no cross-fertilization going on, but as Your Honor knows well, I being a civil lawyer in the Tax Division, cannot either admit nor deny the existence—

THE COURT: I thought you said there was no criminal investigation going on.

MR. LAWLER: I apologize if that is what I said. I certainly didn't mean to state that. What I mean to say is that we are conducting ourselves in the Tax Division solely for civil purposes. What any other division of the Department of Justice may or may not be doing is something, as Your Honor knows, is in their dominion.

THE COURT: Pretty big.

MR. LAWLER: I cannot speak to that.

THE COURT: You don't know of any such activities?

MR. LAWLER: I am aware of the activities of Mr. Goodwin, as Mr. Wadden stated, Mr. Goodwin is with the Criminal Division. I would be happy to explain to the Court how Mr. Goodwin got involved in this particular case.

THE COURT: I do not think it is going to make any difference in the outcome. I would just as well leave well enough alone. Isn't that a good answer?

MR. WADDEN: For the time being, it certainly is, Judge.

. . .

This is a civil case. Where I work, where Mr. Hertz works, is a civil trial section. Our duties have been exclusively civil from day one with respect to this case. We are defending a civil lawsuit. We are not involved in a criminal investigation to any extent. We have, contrary to the bald assertion Synanon makes, we have received no grand jury information

whatsoever. Our duties, Your Honor, are totally to defend this case, and in view of the papers Synanon generates here that we have to reply to, believe me, we have been quite busy in doing just that.

THE COURT: That is obvious.

MR. LAWLER: Now, Synanon makes much of the fact that with respect to certain witness interviews, the United States has been accompanied by Mr. Goodwin of the Criminal Division, and I think, Your Honor, it is time that I indicate to the Court just exactly why that is.

After the United States filed its first motion for a summary judgment, it set about, as I believe we had a duty to do, to find witnesses to the extent that case was going to go to trial. In doing that, we came across three witnesses out in Arizona who tell that incredible story about Synanon's violence and illegal activities, those being Bette Fleishman, whose deposition was taken here, Rodney Mullen and Naya Arbiter.

Your Honor, as a condition for those witnesses to testify for the United States in this case, their counsel advised that it would be necessary for those witnesses to obtain immunity. I knew nothing about immunity. Mr. Hertz knew nothing about immunity. We are civil lawyers.

We spoke with our superiors, what should we do? We believe we need the testimony of these witnesses, indeed, the public requires that this story of violence be told, that this is not a tax-exempt organization. It is a violent cult that attempts to murder people. We thought that was pretty relevant to the issues before Your Honor here, and in that context—

THE COURT: You sure put it forth in your statement of material facts that were alleged to not be in

> dispute in support of your original motion for summary judgment.
>
> MR. LAWLER: We tried to, Your Honor. It is an important story that needs to be told. In any event, in conjunction with our superiors, the Criminal Division, who, if immunity was to be awarded it would have to be approved, as Your Honor knows, it is Title 18 immunity, it has to be approved by the Criminal Division of the Justice Department, the Assistant Attorney General.
>
> For that reason, a determination needed to be made whether or not immunity could be granted, whether or not it was in the public interest to be granted, and that is when Mr. Goodwin accompanied Mr. Hertz and myself to those interviews. That is why he was there.

In early February, 1984, Judge Richey issued an opinion dismissing the civil action with prejudice because of The Synanon Church's fraud upon the court. *Synanon Church v. United States*, 579 F.Supp. 967 (D.C.D.C. 1984). Judge Richey rejected Synanon's assertion that it was entitled to discovery and to relief from discovery on the basis of alleged government misconduct in defending the civil action. Judge Richey ruled at 977-978 in connection with Synanon's allegation that the government had improperly commingled civil and criminal investigations in the defense of Synanon's declaratory relief action:

> Synanon has alleged that the government has improperly commingled civil and criminal investigations in the defense of this lawsuit. . . . This has been vigorously denied time and again by counsel for the government's Tax Division, who have refrained from participation in the artivities of the Criminal Division of the Department of Justice. . . . The only relevant support for plaintiff's claim is 1) an attorney from the Criminal Division at the Department

of Justice accompanied the civil attorneys handling this case on several witness interviews, and 2) the government obtained criminal immunity for several witnesses pursuant to 18 U.S.C. § 6001 *et seq.* before obtaining their sworn statements. Neither of these actions was in any way improper. First, there is no evidence that the presence of the Criminal Division attorney had the purpose or effect of improperly coercing or influencing the witnesses. Further, the government may immunize witnesses in both civil and criminal cases, pursuant to the plain language of § 6003(a), as a number of courts have recognized. *Ryan v. United States*, 568 F.2d 531, 541-42 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *Patrick v. United States*, 524 F.2d 1109, 1120-21 (7th Cir. 1975); *United States v. Cappetto*, 502 F.2d 1351, 1359 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Mahler*, 567 F.Supp. 82, 83-86 (M.D.Pa. 1983). *See also Pillsbury Co. v. Conboy*, 103 S.Ct. 608, 616 n.20 (1983) (reserving the question of United States Attorneys' authority to immunize in civil proceedings).

The mere concurrence of civil and criminal investigations does not give a civil litigant a basis for either discovery or relief. Here, the United States' participation in civil litigation was precipitated by Synanon's filing of this lawsuit. If the government also has reason to conduct a criminal investigation, its failure to do so would be tantamount to nonfeasance and a violation of the duty of the executive branch to faithfully execute and apply the law. Unquestionably, the government's powers in conducting grand jury investigations are substantial and the surrounding secrecy is necessary. There is nothing improper in this, however, unless government attorneys use one area of litigation, civil or criminal, to gain advantages to which they are not entitled in the other. *See United States v. Sells Engineering*

> *Inc.*, 103 S.Ct. 3133, 3142-43 (1983); *United States v. Baggott*, 103 S.Ct. 3164 (1983). *Cf. United States v. Parrott*, 248 F.Supp. 196, 202 (D.D.C. 1965) (improper for the government to *initiate* a parallel civil suit and use discovery to obtain evidence for a subsequent criminal prosecution). Because the government's civil attorneys are entitled to interview witnesses and to obtain grants of criminal immunity for them in the course of defending suits, they have not taken undue advantage of the government's criminal justice powers. If the government's conduct of this case, correct on its face, has been improperly influenced by the existence or the possibility of other litigation, the place to challenge such hypothetical abuses is in those other actions. In this case, plaintiff has no legitimate basis for its claim of governmental misconduct, which the attorneys from the Tax Division have steadfastly and repeatedly denied in open court and in their papers.

(Pltf. Ex. D.) Judge Richey's dismissal of the civil tax case is on appeal.

In asserting that Lawler made misrepresentations to Judge Richey, defendants submit the Declaration of Thomas J. Nolan, which avers in pertinent part:

> 14. Thomas Lawler and/or Francis Hertz and Guy Goodwin traveled to pursue joint civil and criminal investigations for the United States Department of Justice on several separate occasions during the time period of April to at least August 1983.
>
> 15. I have reviewed the testimony of George Farnsworth, given on September 14, 15, 16 and 28, 1983 in *Synanon v. Bernstein.* Mr. Farnsworth's testimony reveals:
>
> A. On or about July 6, 1983, George Farnsworth, a prosecution witness, former Synanon resident and a federal employee, was contacted by Guy Goodwin.

> On the following day, Goodwin, Lawler and Hertz conducted a joint interview with Farnsworth.
>
> B. On August 12, 1983, Lawler and Goodwin conducted a three-hour interview with George Farnsworth. Mr. Farnsworth signed two declarations in the civil action, *Synanon v. USA*, dated August 23, 1983 and September 12, 1983. Mr. Farnsworth's declarations contained allegations regarding certain activities in which he allegedly participated involving computerized listings of Synanon tape recordings.

Defendants assert that Farnsworth "apparently did not request immunity, nor was immunity granted" and that Farnsworth "has testified that he never requested immunity . . ." establishes that Lawler made a factual misrepresentation to Judge Richey. Defendants assert that Lawler's alleged misrepresentation supports either or both of two inferences:

> Either the defense of the civil action was being pursued in bad faith to obtain evidence for the Grand Jury proceedings, thereby circumventing grand jury procedures, or Lawler was seeking to conceal his access to Grand Jury materials in violation of Rule 6(e) . . . . *See, United States v. Sells Engineering, Inc.*, 463 U.S. 418. Either event constitutes grounds for dismissal, and the scope of such impermissible commingling can only be determined through a review of the Grand Jury transcripts.

However, at oral argument, Goodwin asserted:

> The defendants say, 'Ah, yes, but George Farnsworth, when the civil tax lawyers interviewed him, you were present and he didn't seek immunity.' That's right, he didn't. But we didn't know that when we went to see him, and the reason I went, as we have stated in our pleadings, was in the event that became an issue, that I could evaluate this information to see if immunity should be granted.

In addition, the Declaration of Guy Goodwin avers in pertinent part:

> 7. This declarant did not provide grand jury transcripts or any other grand jury material to Thomas Lawler or Francis Hertz or any other attorneys of the Tax Division, United States Department of Justice for use in *The Synanon Church v. USA*, No. 82-2303, United States District Court for the District of Columbia, or for any other use.

The Court is not persuaded that Lawler made any misrepresentations to Judge Richey. Lawler has stated and Goodwin has stated that the purpose of Goodwin's presence at the interviews of certain witnesses was to determine if immunity would be granted. The fact that Lawler did not mention Farnsworth by name or inform Judge Richey that Farnsworth did not request immunity does not establish that another purpose for Goodwin's presence at Farnsworth's interview existed. It certainly does not support the inferences asserted by defendants, especially when defendants seek to use those inferences to justify disclosure of the entire proceedings before the Grand Jury.[1]

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[1] In a footnote, defendants state "[f]urther evidence of Lawler's misrepresentation" is seen in Ex. D. Ex. D is a memo to the Director of the FBI dated October 7, 1983 which states:

> As the Bureau is aware on 12/17/82, a conference took place in Sacramento at the offices of the United States Attorney concerning the Synanon Foundation. Present at that meeting were representatives from the Internal Revenue Service . . . , FBI, and two attorneys from the Tax Division, Department of Justice . . . [Deleted] presented information concerning possible criminal violations, namely, extortion, being committed by high level members of the Synanon Foundation in securing pledges and monies from Synanon members.

The memo goes on to state that it was decided that FBI conduct a certain number of interviews in connection with this information and that the AUSA in Sacramento concluded on October 3, 1983 that the FBI interviews failed to reveal criminal violations and

In addition, defendants assert that Goodwin's apparent role as investigator is in itself improper conduct, "expressly condemned by the courts." However, defendants' sole citation of authority is *United States* v. *Kilpatrick*, 575 F.Supp. 325, 336 (D.Colo. 1983), in which Judge Winner stated:

> In its brief, the government sees no impropriety in this conduct, but I remind [sic] of the Advisory Committee's comment that 'Federal Crimes are "investigated" by the FBI, the IRS or by Treasury Agents and not by *government prosecutors* or the citizens who sit on grand juries.' . . . In any event, I have no doubt that when a prosecutor turns cop, he loses his *Imbler* v. *Pachtman* . . . prosecutorial immunity.

Judge Winner actually was referring to the "Notes of Committee on the Judiciary, Senate Report No. 95-354. Amendments Proposed by the Supreme Court," apparently prepared in connection with the 1977 amendment to Rule 6(e). The Notes state in pertinent part:

> Attorneys for the Government in the performance of their duties with a grand jury must possess the authority to utilize the services of other government employees. Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents and not by government prosecutors or the citizens who sit on

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the matter was being closed. Defendants assert that the two tax attorneys were most likely Lawler and Hertz and queries: "What are two attorneys defending a declaratory relief action in Washington, D.C. doing in California discussing possible criminal violations, especially in light of Lawler's insistence that there was no cross-fertilization?" Even were the court to assume that the tax attorneys were Lawler and Hertz, the court does not see the relevance of this exhibit to the issue before the court, i.e., that there was improper "cross-fertilization" between the tax attorneys defending Synanon and the Grand Jury investigation preceding the indictment in this action.

> grand juries. Federal agents gather and present information relating to criminal behavior to prosecutors who analyze and evaluate it and present it to grand juries. Often the prosecutors need the assistance of the agents in evaluating evidence. Also, if further investigation is required during or after grand jury proceedings, or even during the course of criminal trials, the Federal agents must do it. There is no reason for a barrier of secrecy to exist between the facets of the criminal justice system upon which we all depend to enforce the criminal laws.

Thus, *Kilpatrick* is not sound authority for defendants' proposition. *And see United States v. Sears, Roebuck & Co., Inc., supra* at 1389 n.3.

2. *Government's Utilization of Grand Jury Procedure to Obtain Testimony of Witnesses in the Civil Action.*

In April 1983, Lawler, Hertz and Goodwin conducted joint interviews of witnesses Bette Fleishman, Naya Arbiter and Rod Mullen. All three of these witnesses were granted immunity pursuant to 18 U.S.C. §§ 6002 and 6003. Defendants argue:

> The immunity granted to Fleishman, Arbiter and Mullen was ostensibly granted under the auspices of the Tax Division of the Justice Department for the purpose of obtaining their testimony in *Synanon v. United States.* However, all of the papers concerning the immunity application are under seal, and, therefore, defendants cannot learn if, in fact, the immunity was in any way related to the grand jury investigation and improperly used to assist the civil litigation.
>
> If the immunity orders resulted from legitimate grand jury proceedings, the involvement of the Tax

> Division suggests a probable violation of Rule 6(e) secrecy restrictions. Conversely, there is an obvious abuse of process if the Tax Division obtained immunity orders through manipulation of the Grand Jury. If the transcripts and minutes are ordered disclosed, defendants may be able to establish one or both of these possibilities.

However, as Hertz and Lawler stated, as Judge Richey found, and as Goodwin declares, there has been no commingling as asserted by defendants. The presence of Goodwin at these interviews has been explained and that explanation was acecpted by Judge Richey after lengthy hearings. Defendants assertion quoted above is an unsubstantiated, speculative assertion of impropriety.

3. *Misuse of Grand Jury Subpoenas to Prevent Discovery in Civil Action.*

The declaration of Thomas J. Nolan avers in pertinent part:

> C. After Geoffrey P. Gitner, counsel for Synanon, learned of Farnsworth's identity as a potential prosecution witness, Mr. Gitner called Farnsworth and arranged for an interview on September 10, 1983. Before the interview, on September 9, 1983, an attorney from the Criminal Division went to Farnsworth's government office and took possession of Farnsworth's calendar and some other documents. According to Farnsworth, this was accomplished without a subpoena duces tecum. The attorney told Farnsworth that the calendar was being taken for its 'protection.' Farnsworth had referred to his calendar for some of the names and dates in his declarations regarding Synanon in *Synanon v. USA*. It is my belief that Farnsworth's declaration was also used by the Government as a basis for this criminal prosecution. For example, it is known that Farns-

worth's declaration was relied upon by the Government in motions arising from the Grand Jury proceedings.

. . .

18. Bette Fleishman was named as a Government witness in the case *State of Arizona v. Charles E. Dederich, et al.*, [Case No. C-5857]. Under Arizona criminal procedure, defendants are allowed to interview these witnesses. . . . On July 19, 1983, during her interview statement, Fleishman told defense attorneys, [in the Arizona criminal case] that she had boxes of documents relating to Syanon. Defense counsel requested to review the documents she possessed. On July 21, 1983, the third day of her interview statement, Fleishman's attorney explained that the previous night two FBI agents had come to Fleishman's home and supoenaed [sic] her boxed documents relating to Synanon.

19. In Bette Fleishman's deposition, in *Synanon v. USA*, taken on August 25 and 26, 1983, she revealed that she had reviewed some of the subpoenaed materials prior to drafting and signing her declaration of July 8, 1983. I have reviewed Bette Fleishman's deposition in *Synanon v. USA*.

Defendants argue in connection with these averments:

> The obvious inference to be drawn from this incident [involving Fleishman] is that the Government abused the grand jury process to gain a tactical advantage in civil litigation. This is a potential basis for dismissal of this Indictment. A review of the transcripts and minutes of the Grand Jury will reveal whether any such subpoena duces tecum was ever ordered by the Grand Jury, and will further reveal if the subpoenaed documents were ever used by the Grand Jury. (If this subpoena was issued by a grand jury outside of Washington, D.C., defend-

ants request the records of that proceeding as well.)

. . .

> The inference is inescapable that the Government seized Farnsworth's calendar for the sole purpose of preventing its production to Synanon's counsel. This is a clear abuse of criminal processes in order to gain a tactical advantage in a civil case. The Grand Jury transcript is likely to shed more light on the story of this seizure of Farnsworth's calendar for its protection.

The United States contends that defendants' argument that the government improperly subpoenaed these documents is "totally speculative" and that "[t]he government sought these documents for use in its grand jury investigation . . . [t]here is no showing this was improper." Moreover, the court is at a loss to understand the inference defendants assert arises by the subpoenaing of Fleishman's documents. It is apparent that defendants' reference to a "tactical advantage in civil litigation" refers to Synanon's declaratory relief action. However, Nolan's declaration makes it clear that it was the defense attorneys in the Arizona criminal case who were allegedly prevented from reviewing the Fleishman documents by the fact of their being subpoenaed. Defendants have presented nothing that equates the fact and timing of the subpoenaing of the Fleishman documents with any proceedings pending in the declaratory relief action other than the general statement that "[t]he timing of the seizure of these documents indicates that the only purpose was to shield these documents from being discovered in any proceedings, state or federal."

With regard to the seizure of the Farnsworth calendar, Goodwin stated at oral argument in connection with this motion:

> Mr. Farnsworth's diary was ordered by a court, provided in civil litigation in Washington with re-

> spect to all of those parts which were relevant to his statement, which, of course, the defendants have and have had for many, many years, so that all relevant portions of that diary have been produced to the defendants.

This statement was not contradicted by defendants. It is thus apparent that no such abuse of the Grand Jury process occurred.

4. *Government Attorneys Actively Assisted Third Parties in Civil Litigation Involving Synanon.*

In *Synanon Foundation, Inc. v. Bernstein, et al.*, No. 7189-78, filed in the District of Columbia district court, defendants therein (referred to in this order as Bernstein) filed a motion to dismiss apparently based on the grounds that Synanon had abused the discovery process and that Synanon had perpetrated a fraud upon the court. The district court granted the motion on October 12, 1983 and the District of Columbia Court of Appeals affirmed on January 9, 1986 on the ground that Synanon had perpetrated a fraud upon the court. Defendants argue that Lawler and Hertz improperly assisted counsel for Bernstein, a Mr. Kaplan, in presenting this motion to dismiss in order to gain a tactical advantage in the declaratory relief action filed by Synanon against the United States and in the criminal investigation.

In the court's opinion, defendants' argument barely justifies response. It is specious and, as the court cannot help noting, provides no authority whatsoever supporting an inference, much less a conclusion, of prosecutorial misconduct justifying dismissal of a criminal indictment because civil tax attorneys defending the United States in a civil action cooperate with or assist defense counsel in another civil action in obtaining a dismissal of the action. Defendants argue in pertinent part:

> The cooperation of the Government with the *Bernstein* litigants was designed to, and did, result in

a motion to dismiss hearing in which Judge Braman entered a ruling adverse to Synanon regarding document destruction. The Government used this ruling to obtain a favorable ruling in the civil case based on collateral estoppel. Both rulings have since been relied upon by the Government in the course of the criminal proceedings. It is clear that the Government's conduct in the *Bernstein* case was in furtherance of the scheme to use the grand jury processes to benefit the civil case, and to use the civil case to further the criminal investigation.

Thus, it is clear that the Government used the civil tax case and the *Bernstein* case to advance its criminal prosecution by utilizing civil procedures which would otherwise have been unavailable to prosecutors. The apparent purpose of this tactic was to place the defendants in a vise and to continue tightening the grip until the Government achieved its intended desired results. By injecting matters which were the subject of its criminal investigation into the civil case, the Government forced the defendants into the position of defending themselves and the organization to which they belong. This defense necessarily mandated that certain individuals would file declarations and take the witness stand, playing into the Government's hand. Concurrently, the Government was basing its criminal investigation upon these same facts.

The pendency of the civil tax case provided the Government with an opportunity to raise allegations that Synanon had denied the IRS auditors access to its tapes. This created the following dilemma: (1) it would invite rebuttal of the allegations, giving the Government the opportunity to manufacture a charge of perjury, or (2) it would invite an affirmation of the allegations, giving the Government an opportunity to manufacture a charge of obstruction

> of justice. The declarations and oral statements resulted in Counts Four, Five and Seven, and Overt Acts 22, 24 and 25 of the present Indictment.
>
> On the other side, the pendency of the criminal investigation put Synanon residents, including these defendants, in imminent fear of prosecution, which caused many of them to assert their privilege against self-incrimination. This prevented Synanon from mounting an effective defense against allegations made in the *Bernstein* and tax cases, and ultimately resulted in dismissal of these cases.
>
> This improper commingling by the Government is likely to have resulted in irregularities before the Grand Jury which would be apparent from a review of the transcripts. For example, certain witnesses and documents were obtained by the Government through the improper commingled use of civil and criminal proceedings. If any of these witnesses or documents were presented to the Grand Jury, the proceeding would be directly tainted by prosecutorial misconduct. Thus, the results of the unlawful commingling are likely to be uncovered by disclosure of the transcripts.

The court feels compelled to repeat that Synanon commenced both the *Bernstein* case and the declaratory relief action and it was the acts of defendants on behalf of Synanon which led to the dismissal of these civil actions. There is nothing presented to this court which supports defendants' assertion that the civil tax attorneys' cooperation with Mr. Kaplan "was in furtherance of the scheme to use the grand jury processes to benefit the [declaratory relief action] and to use the [declaratory relief action] to further the criminal case." As the court has previously noted, there is no evidence of a scheme. Defendants' assertion that "[t]he Government used the [declaratory relief action] and the *Bernstein* case to advance its criminal prosecution by utilizing

civil procedures which would have otherwise been unavailable to prosecutors" mystifies the court as defendants provide no description of those "unavailable procedures." While the court can only hope that defendants do not so intend, one inference which can be drawn from this argument is that defendants, acting on behalf of Synanon, could have defrauded two courts even more than those two courts have found.

B. *Violation of Rule 6(e).*

Defendants assert that the Government has apparently violated the general secrecy requirement of Rule 6(e) by hiring Richard Ofshe as a consultant and by sharing materials presented to the Grand Jury with Richard Ofshe.

The court will make short work of this assertion by revealing that no violation of Rule 6(e) occurred. Plaintiff filed *in camera* copies of an Application for Disclosure Order Pursuant to Rule 6(e)(3)(C)(i) and 6(e)(3)(D), F.R.Cr.P. The Application states in pertinent part:

> 1. That the grand jury is engaged in an investigation of violations of federal criminal statutes arising from the destruction of documents, tapes, recordings and other evidence by individuals associated with The Synanon Foundation, Inc., also known as The Synanon Church (hereafter, Synanon) and the creation of false and altered documents to conceal the destruction of evidence in anticipation of demands for such evidence in litigation and federal agency proceedings.
>
> 2. That the grand jury has obtained by subpoena from third parties a large quantity of documents and tape recordings which are represented to have originated in Synanon; that the federal investigative agency involved in the investigation lacks familiar-

ity with Synanon records and the voices appearing on Synanon tape recordings and is unable to make the required analysis of the documents and recordings to assist the grand jury.

3. That the government has employed an expert, Richard J. Ofshe, PhD. who has devoted over ten years to the study of Synanon and who is knowledgeable about its records, tape recordings, and the identities and voices of its officials; that this expert has previously assisted the grand jury in this investigation by giving testimony but has not been provided access to documents subpoenaed by the grand jury; that the completion of the grand jury investigation will require an analysis of the documents and recording by the expert employed by the government;

4. That the federal grand jury investigation is a judicial proceeding as contemplated in Rule 6(e)(3)(c)(i), F.R.Cr.P. See *Doe v. Rosenberry*, 255 F.2d 118 (2nd Cir. 1958); that the documents and recordings subpoenaed by the grand jury were created and had a purpose independent of the grand jury and as such do not reveal the direction and strategy of the grand jury investigation. *SEC v. Dresser Industries*, 628 F.2d 1368, 1382-83 (D.C. Cir. 1980); *Fund for Constitutional Government v. National Archives*, 656 F.2d 856, 869 (D.C.Cir. 1981); that there exists a compelling and particularized need as required in *United States v. Proctor & Gamble*, 356 U.S. 677 (1958), for disclosure of the documents and recordings subpoenaed by the grand jury to the government's expert, Richiard J. Ofshe, in order to assist the federal grand jury; that disclosure of the documents and recordings will be restricted to the government expert's sole use in the grand jury investigation and for no other purpose, and the government's expert will not divulge the documents and recordings to any other persons.

The resulting Order of August 2, 1984 permitting disclosure states in pertinent part:

> IT IS THEREFORE ORDERED that documents and tape recordings obtained by the 84-1 Grand Jury in the investigation of the destruction of documents and tape recordings of Synanon and the creation of false and altered documents by officials and individuals associated with Synanon may be disclosed to Richard J. Ofshe in order that he may assist the federal grand jury in that investigation; and it is further ORDERED that the documents and recordings disclosed pursuant to this order will be used only for the purpose of assisting the federal grand jury and the United States Attorney in the investigation and for no other purpose; and it is further ORDERED that the said Richard J. Ofshe will not disclose the documents and tape recordings to any other persons.

C. *Systematic Pattern of Calling Witnesses for Sole Purpose of Forcing Them to Claim the Fifth Amendment Privilege.*

Defendants contend that the prosecutor engaged in a systematic pattern of calling witnesses before the Grand Jury for the sole purpose of forcing those witnesses to claim the Fifth Amendment and prejudicing the Grand Jury.

In support of this contention is submitted the Declaration of Thomas J. Nolan,[2] which declaration avers in pertinent part:

> 24. Guy Goodwin called at least six of the current defendants, David R. Benjamin, Philip C. Bourdette, Miriam R. Bourdette, Cecelia Jason Dederich, Eliza-

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[2] The court gives no weight to paragraph 26 of Nolan's declaration. The court has received no declaration from Chris Adrian and considers Nolan's averments to be hearsay and speculative.

beth A. Missakian and Steven I. Simon, to appear before the Grand Jury in Washington, D.C., despite his knowledge that they would assert their Fifth Amendment right against self-incrimination. Goodwin also called Glenda Otto and Ellen Broslovsky to appear before the Grand Jury, knowing they too would assert their right against self-incrimination. I personally advised Goodwin, via a phone conversation, that my clients, Mr. and Mrs. Bourdette, if called as witnesses before the grand jury, would assert their Fifth Amendment privilege. On that basis I requested that Mr. and Mrs. Bourdette not be required to appear before the Grand Jury. I am informed and believe that counsel for the other individuals had informed Goodwin that these individuals would also assert their Fifth Amendment privilege.

The Declaration of Guy Goodwin in opposition to this motion avers in pertinent part:

3. At no time prior to their testimony before the grand jury was this declarant advised by Cecelia Jason Dederich, Elizabeth Missakian, Steve Simon, Glenda Otto or Ellen Broslovsky, or by any counsel for any of them, that these witnesses intended to invoke Fifth Amendment rights to all questions of the grand jury.

4. That Cecilia Jason Dederich, Chairman of the Board of Directors of The Synanon Church, was subpoenaed in her capacity as an officer and director to produce corporate records; and this declarant was advised by her then attorney, William Schaffer, that she would testify and produce corporate records. This declarant was surprised when Cecilia Jason Dederich invoked Fifth Amendment rights in the grand jury contrary to her attorney's representations to declarant.

5. That grand jury witnesses Cecelia Jason Dederich, Philip Bourdette, Miriam Bourdette, Elizabeth

> Missakian, Steven Simon, Glenda Otto and Ellen Broslovsky were brought before the grand jury to provide in part evidence to which they had no legitimate Fifth Amendment right. Philip Bourdette and Cecelia Jason Dederich were subpoenaed to produce corporate records. Philip Bourdette, Cecelia Jason Dederich, Miriam Bourdette, Elizabeth Missakian, Steven Simon, Glenda Otto, and Ellen Broslovsky were instructed by the grand jury to provide hand writing exemplars.

However, the Declaration of William Schaffer filed as exhibit to defendants' reply brief avers in pertinent part:

> 3. . . . Among the individuals whom I represented before the Grand Jury were Elizabeth Missakian, Ellen Broslovski, Glenda Otto, and Cecilia Jason Dederich.
>
> . . .
>
> 7. Although I cannot recall whether I specifically advised Mr. Goodwin that these witnesses would assert their Fifth Amendment privilege, I do know that I had previously discussed with him my belief that it was improper and violative of Justice Department policy to call witnesses before the grand jury knowing that they would assert their Fifth Amendment Privilege . . . .
>
> 8. It is my understanding that these witnesses named above in fact followed this advice, and asserted the privilege when they were asked to disclose their address, and as to any further such questions. Regardless of whether I advised Mr. Goodwin in advance of this posture, I do recall that he clearly was not surprised by the assertion of privilege. . . .
>
> . . .
>
> 11. I also represented Cecelia Jason Dederich during her appearance before the Grand Jury. Prior to my undertaking the representation of Ms. Dederich be-

fore the Grand Jury, she was represented by Phillip Bourdette, Esquire. It is my understanding that Mr. Bourdette advised Ms. Dederich to assert her Fifth Amendment privilege, and that he informed Mr. Goodwin of her intent to do so. I have been advised that Mr. Goodwin has stated in the instant proceeding that I advised him Ms. Dederich would produce all corporate records which had been requested in her subpoena. My recollection of events surrounding Ms. Dederich's representation is somewhat clouded by the fact that her personal documents were also subpoenaed, which resulted in the filing of a Motion to Quash and a judicial ruling which preserved all objections to the production of these documents until the time of her grand jury appearance.

12. Nevertheless, I can state to a certainty that I never represented to Mr. Goodwin, nor would I ever represent on behalf of any client, that documents which I had not yet had the opportunity to examine would be produced on a wholesale basis without any claim of privilege, or in the absence of a grant of immunity. To do so in my opinion would constitute professional malpractice . . . .

13. I do specifically remember discussing with Mr. Goodwin my understanding that some courts had held that the act of production of documents by an individual could in and of itself constitute testimony which could form the basis of criminal charges. . . .

Accordingly, although I'm not certain as to what specifically I may have I [sic] represented to Mr. Goodwin regarding Ms. Dederich's testimony, I am certain that I did not advise him on any occasion that she would produce all documents regardless of their privileged nature, absent at least a limited grant of immunity extending to the act of production.

The Declaration of Guy Goodwin filed March 18, 1986 avers in pertinent part:

> 3. William Gray Schaffer was counsel for numerous witnesses who were residents of The Synanon Foundation, Inc., who appeared before the grand jury. William Gray Schaffer did not advise declarant that Synanon resident witnesses Elizabeth Missakian, Ellen Broslovsky or Glenda Otto would assert their Fifth Amendment rights to all questions in the grand jury; nor did William Gray Schaffer make any inquiry of declarant whether immunity might be given to these three witnesses; nor did William Gray Schaffer at any time discuss with declarant the U.S. Department of Justice policy or requirements relating to calling witnesses before the grand jury who might assert Fifth Amendment rights.
>
> 4. William Gray Schaffer was the only attorney identified by grand jury witness Cecelia Jason Dederich as her attorney in the grand jury proceedings. William Gray Schaffer at no time advised declarant that Cecelia Jason Dederich would invoke Fifth Amendment rights in response to grand jury questions regarding production of subpoenaed corporate records.

Albert Kreiger, counsel for Sybil Schiff, stated at oral argument that both he and Phillip Kellogg and James Lyons of Kellogg, Lyons & Williams in Washington, D.C. advised Goodwin that Schiff intended to invoke the Fifth Amendment if asked any question concerning her relationship with or her sojourn with Synanon. Kreiger further stated: "I asked Mr. Lyons whether he had offered a written declaration of Mrs. Schiff's intention to interpose the Fifth Amendment privilege, and he advised me it would serve no purpose. Her presence was necessary."

As explained in *United States v. Horowitz*, 452 F. Supp. 415, 418 (S.D.N.Y. 1978):

> Little need be said with regard to Mongello's claim of prosecutorial misconduct. That the government sought to question Mongello concerning his knowledge of the events under investigation while aware that Mongell intended to assert his privilege was not improper. *United States v. Wolfson*, 405 F.2d 779, 785 (2d Cir. 1968), *cert. denied*, 394 U.S. 946, 89 S.Ct. 1275, 22 L.Ed.2d 479 (1969). Indeed, even were Mongello subpoenaed to testify, it would not have been improper to call him even were the government previously informed that the privilege would be claimed, unless Mongello were called solely for the purpose of displaying his claim of privilege to the grand jury. *United States v. Fortunato*. 4-2 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933, 89 S.Ct. 1205, 22 L.Ed.2d 463 (1969).

Moreover, Title 9, Chapter 9-11.254 of the United States Attorneys' Manual (3-6-80) provides:

> A question frequently faced by federal prosecutors is how to respond to an assertion by a prospective grand jury witness that if called to testify he will refuse to testify on Fifth Amendment grounds. Some argue that unless the prosecutor is prepared to seek an order pursuant to 18 U.S.C. § 6003, the witness should be excused from testifying. However, such a broad rule would be improper and too convenient for witnesses to avoid testifying truthfully to their knowledge of relevant facts. Moreover, once compelled to appear, the witness may be willing and able to answer some or all of the grand jury's questions without incriminating himself. However, if a 'target' of the investigation (as defined in 9-11.250, *supra*) and his attorney state in a writing signed by both that the 'target' will refuse to testify on Fifth Amendment grounds, the witness ordinarily should be excused from testifying unless the grand jury and the U.S. Attorney agree to insist on the appear-

> ance. In determining the desirability of insisting on the appearance of such a person, consideration should be given to the factors which justified the subpoena in the first place, i.e., the importance of the testimony or other information sought, its unavailability from other sources, and the applicability of the Fifth Amendment privilege to the likely areas of inquiry. (See 9-11.251, *supra*).

At oral argument, the court was presented with copies of transcripts of Grand Jury testimony of seven of the nine defendants herein. These transcripts had been provided to these defendants in discovery pursuant to Rule 16. The transcripts presented to the court are those of: Sybil Schiff (May 3, 1984), Elizabeth Missakian (August 13, 1985), Phillip C. Bourdette (August 13, 1985), Miriam Bourdette (August 27, 1985), Cecelia Jason Dederich (August 27, 1985), and David Benjamin (September 10, 1985). The court notes that the transcripts of the testimony of Sybil Schiff, Elizabeth Missakian, Miriam Bourdette, and David Benjamin appear to be only partial transcripts of their testimony.

The court's review of the transcripts provided persuades the court that defendants have not shown a colorable claim that the prosecutor engaged in a systematic pattern of calling witnesses for the sole purpose of forcing them to claim the Fifth Amendment privilege. As Goodwin has averred, the Grand Jury had directed that Missakian, the Bourdettes, Simon, Dederich and Benjamin provide handwriting exemplars for the use of the Grand Jury in its investigation. In addition, Phillip Bourdette and Dederich had been served with Grand Jury subpoenas duces tecum. In fact, Dederich was under court order to produce documents sought by one of the two subpoenas which had been served on her, an order with which Dederich failed to comply. Defendants argue that requiring the respective defendants to appear before the Grand Jury to obtain handwriting exemplars was un-

necessary because, according to the Declaration of William Schaffer attached to defendants' reply brief, ". . . since if asked, I would have arranged for my clients to voluntarily produce the requested exemplars at an FBI office closer to their homes [and] I am confident that my clients would gladly have agreed to cooperate with the investigation in this regard. . . ." However, the court has been presented with no evidence that any of the defendants or their respective counsel requested the opportunity to provide the exemplars at another location. The court does not believe it is the Grand Jury or prosecutor's obligation to initiate inquiry whether compliance with Grand Jury directives is inconvenient.

As further evidence of the government's systematic pattern, defendants have attached as Exhibit N to their opening brief an Affidavit of Dominic P. Gentile, counsel for Ronald V. Cook, which affidavit was executed on December 21, 1984 and apparently was prepared in connection with a Motion to Quash Subpoena of Ronald V. Cook. The court has not been provided with a copy of Gentile's motion. Attached as Exhibit I to plaintiff's opposition to the motion before this court is a copy of the Government Response to Motion to Quash Subpoena of Ronald V. Cook and Other Relief, the certificate of service indicating that it was executed in January 1985. Plaintiff asserts that the District of Columbia District Court denied the motion, although no copy of the court order or transcript of the proceedings has been provided to this court. The court has set this forth in some detail because it is apparent from Gentile's affidavit that there was an earlier Motion to Quash Subpoena and for Other Relief heard by the District of Columbia District Court on November 29, 1984, which also apparently was denied. The paucity of pleadings provided to the court makes it somewhat difficult to determine what happened and why and what the District of Columbia District Court concluded in connection with these motions to quash. However, it is clear that defendants have submitted Gentile's affidavit

for its averments that Goodwin did not inform Gentile or Cook that Goodwin had already obtained a court order granting Cook immunity prior to Cook's appearance before the Grand Jury on November 13, 1984, thereby causing Cook to assert his Fifth Amendment privilege during his testimony on November 13, 1984. Gentile also avers that Goodwin still did not inform Gentile or Cook about the existence of the court ordered immunity when Cook was subpoenaed to appear before the Grand Jury on November 29, 1984, this second subpoena causing Gentile to file a motion to quash on November 29, 1984 on the grounds that Goodwin "knew my client had asserted his Fifth Amendment privilege earlier before the Grand Jury and was now bringing him back a second time and that my client intended to continue to assert that privilege unless he were granted immunity." Gentile avers that only at the November 29, 1984 hearing on the motion to quash did he learn that an immunity order had been signed on November 9, 1984. The pertinent averments from Gentile's affidavit are as follows:

> 9. On November 13, 1984 I acompanied my client, Ronald Victor Cook, to the United States District Courthouse in Washington, D.C. and met with Mr. Goodwin outside of the entrance to the Grand Jury room before Mr. Cook entered the Grand Jury.
>
> 10. At that time Mr. Goodwin and I conferred and I advised Mr. Goodwin that my client would not testify and would assert his Fifth Amendment privilege to each of the questions which would be propounded to him by the Grand Jury so long as said privilege could be asserted in good faith.
>
> 11. At that time Mr. Goodwin advised me that he was prepared to seek a grant of immunity for my client but that he wanted my client to make a proffer of evidence to him prior to seeking immunity pursuant to 18 U.S.C. Sections 6002 and 6003.
>
> 12. At that time I agreed to meet with Mr. Goodwin and my client later that afternoon. My client then

went into the Grand Jury where he remained for approximately twenty minutes. I have it on information and belief, as related to me both by my client and by Mr. Goodwin, that my client asserted his Fifth Amendment privilege to virtually all questions propounded to him except his name and his city of residence.

13. Later that afternoon I met with Mr. Goodwin and my client along with Special Agent Warren Landscott of the Federal Bureau of Investigation. Prior to this meeting and after my client finished his appearance before the Grand Jury earlier that morning, Mr. Goodwin advised me that the scope of the Grand Jury's inquiry was broad but that it included, although it was not limited to, the subjects of violence, money and a meeting in formia Italy about which Mr. Goodwin believed my client had information. The entire Grand Jury proceeding, however, focused upon the activities of my client as they related to the Synanon Church.

14. At approximately 2:00 p.m. Mr. Cook and I arrived at Mr. Goodwin's office. We went upstairs into a conference room where Mr. Landscott was already seated. Shortly after arriving in that room, and before any discussion commenced, Mr. Goodwin handed to me a letter signed by him which set out in general terms the fact that the purpose for the meeting was for my client to make a proffer to Mr. Goodwin of any and all information that my client possessed relating to the subject matter of the grand jury's inquiry. The letter, again by its terms, clearly indicated that the proffer was being made for the purpose of the Government, through Mr. Goodwin, to evaluate whether or not my client's knowledge would be of benefit to the Government in the investigation. The letter went on to state that whatever my client said during the proffer would not be used against

him at a later date if the Government chose not to grant him immunity from prosecution pursuant to 18 U.S.C. Section 6002, *et seq.*

15. From reading this letter it became clear to me that as of that time the Government had not as yet obtained a grant of immunity and, furthermore, only intended to obtain a court order granting immunity if my client made the proffer and if what was proffered by my client was considered by Mr. Goodwin to be beneficial to the Government's case. The letter was clearly intended by its writer to both conceal the fact that an order of immunity had already been entered by Judge Aubrey Robinson and to mislead both my client and myself into believing that immunity would only be granted if my client made the proffer. In fact, Mr. Goodwin, when discussing orally at that time what he wanted from my client made reference to the fact that Mr. Cook was expected to tell Mr. Goodwin 'the truth, as we (the Government) know it to exist.'

16. During the meeting which took place on the afternoon of November 13, 1984 with Mr. Goodwin, Special Agent Landscott, my client and myself, my client made no statement and I advised Mr. Goodwin that in light of the fact that my client had been deposed for over thirty-five days about subject matters relating to or possibly relating to the inquiry of the Grand Jury, I felt that it was in my client's best interest and my legal obligation to review those transcripts before permitting my client to discuss anything with the Government agents, formally or informally. It was my concern that perhaps my client would contradict something that he had said earlier under oath in a deposition and that this would lead to the Government agents disbelieving my client or, perhaps even worse, might be used as evidence in

a perjury prosecution should my client testify before the Grand Jury under a grant of immunity.

17. Upon my advising Mr. Goodwin of my client's continued refusal to make a proffer of evidence to him, Mr. Goodwin then took back the letter which he previously had given to me and handed to my client in my presence another subpoena to appear before the same Grand Jury before which he had appeared that morning and asserted his Fifth Amendment privilege.

Plaintiff's Exhibit I stated in pertinent part:

> The government did not intend to mislead the witness regarding his immunity when he appeared at the grand jury session on November 13, 1984; nor does the government believe that the witness could have been mislead by the government prosecutor's statements. When the witness and his counsel appeared on November 13, 1984, he and his counsel were advised that the government was prepared to immunize the witness but wanted to obtain a proffer preliminary to his testimony. There was nothing in this statement which was intended to mislead the witness. Although the existence of the November 9, 1984, court order was not specifically mentioned, the intent effect of the government's statement was the same. The fact that a prospective order of immunity may have been granted does not compel the government to use the immunity grant immediately, or at all. The immunity of the witness does not attach until the witness gives testimony in accordance wit [sic] the order. The law, as counsel for movant admits, does not require that the prosecutor 'communicate knowledge of the prospective grant of immunity to the witness.'
>
> The witness was not mislead by the government, nor did the government intent to mislead the witness

when his attorney was advised that the government was prepared to immunize the witness. This statement was tantamount to advice that an order was in existence. However, the government prosecutor and counsel for the witness agreed that the witness would first make a proffer of his testimony in order to protect the interest of the witness, whose counsel expressed concerns about contradictions with prior testimony, and to protect the interests of the government by determining in advance if the proffered testimony was worthwhile. It was therefore agreed that the witness would make his proffer later the same day. This course of conduct appeared to be in the best interest of both parties, and there was nothing devious or misleading in the government's conduct. It was in fact a substantial surprise to the government when the witness and his counsel appeared later in the day, after the grand jury had been excused, and announced that they would not make a proffer. It was this conduct in the part of the witness and his counsel in refusing to go forward with the proffer which made it necessary for the witness to return at a later date.

The witness also complains that the government was guilty of misconduct in having the witness appear in the grand jury on November 13, 1984, to assert his Fifth Amendment privilege. In fact, the witness appeared briefly and asserted his Fifth Amendment right to only a few substantial questions. This procedure was discussed with counsel for the witness prior to his appearance in the grand jury, and it was agreed between counsel that the witness would appear and assert his Fifth Amendment right to a few questions and be excused in order that the proffer could be made. The witness should not now be permitted to object to his appearance when his counsel made no objection at the time. The ABA

> standards of conduct governing grand jury matters do not cover a situation like this one, and do not afford a basis, in any event, for relief to the witness. The witness was, of course, given immunity, the grand jury was advised of that fact, and the witness has testified to numerous questions in the grand jury, except for those to which he has asserted marital privilege.

In the Supplemental Declaration of Dominic P. Gentile in Support of Defendants' Motion for Disclosure of Grand Jury Transcripts filed on April 4, 1986, Gentile avers: "It is my position that any agreement on my part to Mr. Cook's assertion of his Fifth Amendment right was improperly induced by Mr. Goodwin's wrongful omission of the critical fact that Mr. Goodwin had already obtained an immunity order."

The court again concludes that Gentile's averments do not support an inference that the prosecutor engaged in a systematic pattern of calling witnesses for the sole purpose of forcing them to claim their Fifth Amendment privilege. While Gentile and Goodwin obviously disagreed on when an immunity order must be disclosed, it is apparent to the court that Cook was called before the Grand Jury in connection with his immunity and not for the sole purpose of claiming the Fifth Amendment.

D. *Improper Comments and Harassment of Witnesses.*

In arguing that the Grand Jury transcripts will reveal the Government's affirmative acts involving disregard of its duty of fairness in the interrogation of witnesses, the making of prejudicial comments to the Grand Jury and gratuitous remarks to discredit witnesses, and harassment of witnesses, defendants have submitted declarations of David Benjamin, William Schaffer, Yvette Van Dalsem, Dominic P. Gentile, and Thomas J. Nolan. Benjamin's declaration avers in pertinent part:

2. On September 26, 1985, I approached Mr. Goodwin to speak with him in the hallway outside the grand jury room in the United States Courthouse in the District of Columbia during a recess of the Grand Jury. In the hallway, I told Mr. Goodwin that I was acting as my own counsel to date and that I wanted to speak with Mr. Goodwin as a target and a lawyer representing myself. I asked Mr. Goodwin whether, if there were indictments handed down, I could surrender, rather than being transported from California to Washingon in custody. Mr. Goodwin said that he would not talk to me. Thereupon, Mr. Goodwin walked toward a group of about seven Grand Jurors in recess in the hallway and loudly stated that he would not speak with me. All of the Grand Jurors present could easily hear his comments, if they had normal hearing. Mr. Goodwin then motioned the Grand Jurors to enter the grand jury room from their recess, laughed, and said to the group, 'I keep telling him I can't talk to him.' Several of the Grand Jurors laughed.

Schaffer's declaration avers in pertinent part:

2. Dennis Speert was subpoenaed before the grand jury, and appeared and testified on August 27, 1985. During and following the testimony by Mr. Speert, Justice Department prosecutor Guy Goodwin repeatedly made derogatory remarks concerning Mr. Speert to me and in the presence of others. Specifically, these remarks included at least one statement by Mr. Goodwin that Mr. Speert was a 'wimp.' In addition, in the context of attempting to limit future appearances by Mr. Speert or at least schedule such appearances at a time consistent with his responsibilitiies as an officer of Synanon, Mr. Goodwin repeatedly ridiculed Mr. Speert, again in the presence of others, by stating that he did not or could not possibly have any serious responsibilities.

3. Although Mr. Goodwin had been advised that Mr. Speert was not the custodian of certain records, which the grand jury had subpoenaed, and that he had no knowledge of certain subjects into which the grand jury wished to inquire, Mr. Goodwin repeatedly harassed Mr. Speert, and publicly expressed incredulity and skepticism that Mr. Speert could not answer such questions. I have been advised that Mr. Goodwin adopted a similar attitude toward Mr. Speert during his actual appearance before the grand jury.

4. Following Mr. Speert's August 27, 1985 appearance before the grand jury, Mr. Goodwin refused to release him, contending to Mr. Speert and myself that Mr. Speert was subject to recall by the grand jury at any time, and that if he failed to appear, Mr. Goodwin would have him held in contempt.

5. In addition, Mr. Goodwin demanded that Mr. Speert undertake a number of investigatory tasks, including making numerous inquiries of third persons, and then to return to the grand jury to report the results of his findings. The matters which Mr. Goodwin demanded information of Mr. Speert were beyond the scope of his personal knowledge, and known to be so by Mr. Goodwin, inasmuch as he had been previously so advised. Nevertheless, Mr. Goodwin attempted to compel Mr. Speert to act as the grand jury's agent in this regard, through intimidation and the threat of judicial process. Again, Mr. Goodwin threatened 'to have Mr. Speert held in contempt' if he failed to comply. I have been further advised that when Mr. Speert attempted to take notes as to these purported assignment, Mr. Goodwin refused to permit him to do so.

Van Dalsem avers in pertinent part:

3. On September 12, 1985, I had been testifying at length about the manner in which tape recordings

were gathered under my direction at Synanon to respond to the grand Jury's subpoena duces tecm. Mr. Goodwin asked me if Synanon had produced all of the tape recordings in its possession which were responsive to that subpoena. Mr. Goodwin demanded that I answer this question only with a yes or no. I explained to Mr. Goodwin that I could only tell him that Synanon had produced the responsive tape recordings which could be located based upon a reasonable search in the short time available, and I explained the scope of that search many times. I explained several times that I could not state under oath that every responsive tape recording in Synanon's possession anywhere had been found, due to the fact that tapes may not have been located in our search. I assured Mr. Goodwin that I produced every responsive tape I could find and that I felt satisfied that the search was thorough. Mr. Goodwin's insistence on a yes or no answer caused me to leave the grand jury room to consult with my attorney. One of the times I left the room to discuss this situation with my attorney, I heard Grand Jurors laughing. Mr. Goodwin's facial expressions and tone throughout this questioning made be extremely uncomfortable, because it seemed that he believed I was being untruthful.

5. Shortly after this incident and before I was excused, I asked to make something clear. I felt it was important to remind Mr. Goodwin that in the documents Synanon had produced more than two weeks before, there were sheets of paper indicating where privileges were claimed for certain withheld paper documents. Therefore, I stated that it was my understanding that Mr. Goodwin had already been informed that certain paper documents which had been subpoenaed by the Grand Jury had been withheld from production on a claim of privilege. Upon

hearing this, Mr. Goodwin put his foot up on the table in front of me and used it to shove his chair away from the table, threw his writing instrument on the table and rolled his eyes. Mr. Goodwin previously had led me to believe that his need of me as a witness was soon to be done and that I could return to my home in California that day. Instead, Mr. Goodwin ordered me to appear again before the Grand Jury in five days, on Tuesday, September 17, 1985, to answer questions about the privileged documents. Upon leaving the grand jury room, I was in tears by Mr. Goodwin's harassment of me on the witness stand and because I had expected to be excused so that I could return home. Through negotiations between my attorney and Mr. Goodwin, I was not required to reappear on September 17, so I could return home as scheduled, but I had to return to testify again on September 24 and 26.

6. While testifying before the Grand Jury, I was asked questions about my former husband and my Synanon Love Match, a religious marriage ceremony.

Gentile, in the portion of his affidavit submitted as defendants Exhibit N avers:

28. On his trips out of the Grand Jury room to consult with me, Mr. Cook reported to me that when he would assert the marital privilege from time to time Mr. Goodwin was deliberately utilizing facial expressions and bodily gestures which communicated his disapproval and scorn of Mr. Cook's assertion of the marital privilege and that these expressions were done in the presence and within the view of the Grand Jurors. It was Mr. Cook's belief that the Grand Jurors were responding to Mr. Goodwin's body language. Mr. Cook advised me that this belief was based upon the fact that at one time he actually heard a Grand Juror hiss simultaneously with Mr. Goodwin's gestural ridicule of Mr. Cook.

29. Mr. Cook also advised me from time to time that Mr. Goodwin would use the technique of asking him a question which called for a narative [sic] response and, when Mr. Cook would assert a marital privilege to that question, Mr. Goodwin would follow the marital assertion with another question which was framed in such a manner to assume as a fact what was sought by the previous question. For example, at one time in the proceedings Mr. Goodwin asked Mr. Cook a question to the following effect:

> Question: Were you present at the beating of four people in the basement at the Synanon facility in Santa Monica?
>
> Answer: I refuse to answer that question based upon my marital testimonial privilege.
>
> Question: During that beating of four people in Santa Monica, *for which you were present*, was (so-and-so) . . . also present?

30. In addition to the foregoing example, there were many, many reports made to me by Mr. Cook that Mr. Goodwin would ask questions that were both leading, compound and pregnant. For example, just prior to Mr. Cook being released from the Grand Jury at approximately 4:03 p.m., Mr. Cook was asked the question which he reported to me in the following language:

> Question: Were you aware that Paul Marantz was assaulted and that Charles E. Diedrich and others pled *nolo contendre* to that charge?

When Mr. Cook came out to report this question to me it was obvious to me that it was compound and that if he were to answer it 'yes' or 'no' he could easily be prosecuted for perjury because he could have been aware that Mr. Marantz was assaulted but not aware that Mr. Diedrich and others had

> pled, or vice versa, or he could have been totally unaware of either aspect of the question.

Nolan's declaration avers:

> 25. I am informed and believe that during the Grand Jury testimony of my client, Miriam Bourdette, she accidently fumbled some notes written on a few cards which she had brought into the Grand Jury room. After fumbling the cards, she smiled. Prosecutor Goodwin, seeing her smile, berated her before the Grand Jurors, stating that the Grand Jury hearings were 'serious proceedings.'

In response, the United States submits the Declaration of Guy L. Goodwin, which avers in pertinent part:

> 6. This declarant did not make facial expressions of disbelief or disapproval when Yvette Van Dalsom, Ronald V. Cook or any other witness testified before the grand jury; this declarant did not throw a pen or pencil on a table in an expression of disbelief, disapproval, or for any other reason during the grand jury testimony of Yvette Van Dalsom or any other witness; this declarant did not at any time order or direct Yvette Van Dalsom or any other person to answer yes or no to questions insusceptible of such answers during appearances in the grand jury; and this declarant at no time yelled at David Benjamin in the presence of grand jurors.

While not expressing an opinion whether or not Goodwin made physical gestures or used an improper tone when questioning Van Dalsem and Cook or whether or not Goodwin made the statements he is alleged to have made by Benjamin and Schaffer, the court is of the opinion that disclosure of the Grand Jury transcripts would not substantiate these types of alleged misconduct because the transcripts would not reveal their occurrence. The court would further point out that transcript of Miriam Bourdette's testimony before the Grand Jury

provided to the court by defendants does not substantiate Mr. Nolan's averment quoted above. The transcript reveals the following colloquy:

> A Upon the advice of my attorney, I respectfully decline to answer that question asserting my Fifth Amendment privilege not to testify incrim—and answer any question that might tend to incriminate me or the fruits of which might tend to incriminate me.
>
> Q Ms. Bourdette, I'm sure you understand, although you seem to be amused by these matters, that this is a serious proceeding. You do understand that, do you not, that this is a serious matter?
>
> A Mr. Goodwin, I understand that it's serious, but—
>
> Q We just want to be sure, because—
>
> A —it also has its humor.
>
> Q —your conduct seems to indicate that—
>
> A It has its humor.

However, the court cannot determine whether or not Goodwin orally expressed incredulity and skepticism to the Grand Jury concerning Speert's testimony on August 27, 1985, whether Goodwin insisted on a yes or no answer when questioning Van Dalsem on September 12, 1985, or whether Goodwin asked leading, compound and pregnant questions of Ronald Cook on November 29, 1984. Accordingly, the court orders these transcripts to the court *in camera* for its inspection.

E. *Failure to Provide Evidence of the Doubtful Credibility of Certain Witnesses and Other Evidence Directly Negating Guilt.*

Defendants argue that disclosure of the Grand Jury transcripts is required to support their contention that

the prosecutor's failure to provide evidence of the doubtful credibility of certain witnesses and other evidence directly negating guilt warrants dismissal of the indictment.

The government need not produce before the Grand Jury evidence which tends to undermine the credibility of its witnesses. *Jack v. United States*, 409 F.2d 522, 524 (9th Cir. 1968) *Loraine v. United States*, 396 F.2d 335, 339 (9th Cir.), *cert. denied*, 393 U.S. 933 (1968). However, "'[i]f evidence exists, however, which casts serious doubts on the credibility of testimony which the jurors are asked to rely upon in finding an indictment, the prosecutor has an ethical duty to bring it to their attention.'" *United States v. Samango*, *supra* at 882 n.8.

In the Declaration of Thomas J. Nolan, it is averred in pertinent part:

> C. *The 1984 Los Angeles County, California Indictments.*
>
> 9. On June 21, 1984, thirteen current and former residents of Synanon were indicted by the Los Angeles County Grand Jury on charges of preparing false evidence, offering false evidence, conspiracy to obstruct justice, and perjury. Eight of the nine defendants in the current proceedings were indicted by the Los Angeles County Grand Jury. Of the persons presently indicted, only David R. Benjamin was not indicted in Los Angeles.
>
> 10. Due to numerous defects on the face of the Indictment, the Los Angeles defendants filed a Demurrer on October 19, 1984. Examples of defects in the Indictment included charging perjury for statements which were simply not made, charging a witness for an act for which she had been granted immunity, and misleading the Grand Jury about the applicable statute of limitations. This Demurrer

> was never responded to by the prosecution. Instead, on December 28, 1984, the Honorable Robert Devich, Judge of the Los Angeles Superior Court (now an Associate Justice on California's Second District Court of Appeal), dismissed the Indictment against all thirteen individuals at the request of the District Attorney's office, which wrote in a letter dated December 19, 1984, that it had developed further evidence and that, 'This independent evidence corroborated some Grand Jury witnesses but cast serious doubts on the credibility of other key witnesses including some current Synanon members.' In a later letter, dated November 18, 1985, the Los Angeles District Attorney revealed that at least some of the 'key witnesses' referred to were Linda James and Jay Nolan. Attached hereto as Exhibits "O" and "P" are true and correct copies of correspondence authored by the Los Angeles County District Attorney's office, dated December 19, 1984 and November 18, 1985, respectively.

Defendants assert that it is known that Linda James testified before the Washington, D.C. Grand Jury but that it is not known whether Jay Nolan testified. They contend that "it is imperative that the defendants review the Grand Jury Transcripts of the testimony of Linda James (and Jay Nolan, if any) to see if grounds for dismissal exist based upon the failure to provide evidence negating guilt."

Defendants' Exhibit P states: "This independent evidence consists of the affidavits of Linda James, dated September 19, 1984, and the thirty-three affidavits pertaining to Jay Nolan. These affidavits were offered by defense counsel at the probation violation hearing of Charles E. Dederich." This court has not been provided a copy of the dismissed indictment or the affidavits referred to in Exhibit P. While defendants assert that "[t]he Los Angeles indictments and the present action

are based on some of the same factors, i.e., alleged destruction of documents and obstruction of justice," the court has no way of gauging whether or not the testimony of these witnesses was of the same events in both grand jury proceedings or what caused the Los Angeles District Attorney's Office to question James' and Nolan's credibility. Furthermore, defendants' Exhibit O states in its entirety:

> The District Attorney's Office intends to move to dismiss Indictment A 754010 (eight counts) in the interest of justice pursuant to Penal Code Section 1385. This motion will be made on the ground that the Indictment has been superseded by a twelve-count felony complaint filed in the Los Angeles Municipal Court. The Indictment was the result of Grand Jury hearings concerning the evidence available at that time.
>
> After the Grand Jury returned the Indictment on June 25, 1984, the District Attorney's Office continued the investigation and further developed the evidence produced at the Grand Jury Hearing. This independent evidence corroborated some Grand Jury witnesses but cast serious doubts on the credibility of other key witnesses, including some current Synanon members. The continuing investigation also revealed a much clearer view of plausible defense arguments by some indictees. Based on our reevaluation of the evidence and plausible defenses, we must conclude that the evidence does not warrant continued prosecution under the indictment.
>
> It is the position of the District Attorney's Office that all substantial allegations of wrongdoing raised by the Grand Jury investigation will be fully litigated by the superseding complaint and that all major participants in the alleged wrongdoing have been ascertained. Finally, all indications are that post-indictment preliminary hearings are desired, at

least by some of the current defendants, pursuant to their rights accorded by *People v. Hawkins*, 22 Cal.3d 584. Therefore, the procedure outlined above seems to be truly in the interest of justice.

In addition, defendants assert that if Ofshe was a Grand Jury witness and Goodwin failed to inform the Grand Jury of Ofshe's prejudice, grounds for dismissal of the indictment may be present. The Government's *in camera* submission makes it clear that Ofshe also was a Grand Jury witness.

The basis of the claim of prejudice is the fact that Ofshe is a defendant and cross-complainant in *Burke, et al. v. Reader's Digest Association, Inc., et al.*, No. 108266, commenced in the Marin County Superior Court at some date and for some purpose undisclosed by defendants herein. On July 23, 1984, Ofshe filed a First Amended Cross-Complaint for Damages against Synanon and other entities and against David Benjamin, Philip Bourdette, Miriam Bourdette, Cecelia Jason Dederich, Daniel Garrett and Steven Simon and others alleging causes of action for malicious prosecution, abuse of process (which includes an allegation of the systematic destruction or removal of evidence including tape recording and documents), intentional infliction of emotional distress, and intentional spoliation of evidence. Defendants assert that "[t]he suit alleges that these defendants and others spoliated evidence relevant to Ofshe's claim and defenses against Synanon and Synanon residents. The alleged acts of spoliation appear to be substantially identical to the acts alleged in the present case." As additional evidence of Ofshe's bias and prejudice against Synanon is submitted defendants Exhibit M. Exhibit M is comprised of four affidavits of Lee Stewart Coleman, M.D., Jack D. Douglas, Ph.D., Armand L. Mauss, Ph.D., and George Nash, Ph.D., respectively. These affidavits

are severely critical of certain sociological studies, conclusions and publications concerning Synanon prepared by Ofshe and assert generally that he is prejudiced and biased against Synanon. These affidavits, which were all executed in April 1983, "were submitted by Synanon in 1983 in motion papers in the declaratory relief action, the same motion papers which contain the declarations which are the basis for Counts Five and Six." Defendants further assert that "[i]n view of this, and in view of the close contact between Goodwin and the Government's civil tax [sic], it is reasonable to believe that Goodwin was aware of these affidavits challenging Ofshe's credentials."

The court is persuaded that the allegations concerning Ofshe's prejudice do not suffice to require disclosure of any Grand Jury transcripts. They do not case the serious doubts on his credibility such as was the case *Samango*.

In their reply brief, defendants present the Declaration of Richard Gross in support of their assertion that Mr. Goodwin failed to present exculpatory evidence to the Grand Jury.

However, the Ninth Circuit has rejected the argument that an indictment should be dismissed for failure of the prosecution to present exculpatory material to the Grand Jury because the prosecution has no legal obligation to do so. *United States v. Al Mudarris, supra*; *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); *see also United States v. McClintock*, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 75 (1985). Thus, to the extent defendants seek disclosure of the Grand Jury transcripts and minutes based on the government's failure to call exculpatory witnesses such as Richard Gross, the motion is denied.

F. *Prior Instances of Prosecutorial Misconduct.*

Defendants assert that an additional factor which enhances the likelihood of prosecutorial misconduct in the Grand Jury proceedings is a prior instance of misconduct by this prosecutor. There is authority indicating that a factor in determining whether dismissal of an indictment on supervisory grounds, as opposed to constitutional grounds, is the need to discipline the particular prosecutor in light of any past misconduct. *See United States v. McClintock*, *supra* at 1284-1285; *United States v. Sears, Roebuck & Co., Inc.*, *supra* at 1395 (dissenting opinion). However, the instance of prosecutorial misconduct referred to by defendants was alleged to have occurred in 1972. None of the decisions cited by plaintiffs decided this allegation on the merits and in fact it was never decided. Thus, in *Briggs v. Goodwin*, 384 F. Supp. 1228 (D.C.D.C. 1974), the district court denied a motion to dismiss for failure to state a claim upon which relief could be granted. This decision was affirmed in *Briggs v. Goodwin*, 569 F.2d 10 (D.C.Cir. 1977), *cert. denied*, 437 U.S. 904 (1978). On remand, the district court granted summary judgment for Goodwin in an unpublished decision. This decision was reversed in *Briggs v. Goodwin*, 698 F.2d 486 (D.C.Cir. 1983). However, a rehearing was granted and the opinion reported at 698 F.2d 486 was vacated in *Briggs v. Goodwin*, 712 F.2d 1444 (D.C.Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), the Court of Appeals holding that a United States Attorney who allegedly gave false sworn testimony before a district court during grand jury proceedings enjoyed absolute immunity as a witness. While defendants argue that the "vacating opinion certainly does not appear to exonerate Mr. Goodwin," citing 712 F.2d at 1449 n.36, this footnote merely expresses its concern about the absolute immunity doctrine:

> While upholding appellee's absolute immunity claim, we note our deep concern. The allegations in this case painfully illustrate the significant costs of this holding—not only to the appellant, but to the integrity of our criminal justice system as well. As the state's lawyer and an officer of the court, a prosecutor has a special obligation to discharge his duties lawfully and fairly. In this case, appellant claims that a prosecutor perjured himself from the witness stand during a criminal investigation. Our response to appellant's claim is that a civil damages action, whatever its merits, may not be pursued against the prosecutor. Instead, appellant must rely on the possibility of a prosecution of the prosecutor by his fellow prosecutors. We find it troubling that our system of justice, which rests so fundamentally on the consent of the governed, offers such inadequate remedies for official violations of individuals' constitutional rights.

In a further attempt to set before the court prior instances of Goodwin's misconduct, the Declaration of Thomas J. Nolan avers:

> 29. Attached hereto as Exhibit 'T' is a true and correct copy of an excerpt of *Representation of Witnesses Before Federal Grand Juries* regarding prosecutorial abuse of federal grand juries. Pages 12-21 and 12-22 set forth conduct of abuse of the grand jury process before Tucson and Seattle grand juries. I am informed and believe, and on that basis allege, that prosecutor Guy Goodwin was the federal prosecutor who conducted the examination of witnesses before the Tucson grand jury in 1970 and before the Seattle grand jury in 1972, set forth in Ex. 'T'.
>
> 30. I have reason to believe that Goodwin had knowledge about or was involved in abusive conduct re-

lating to grand juries and material witness warrants. Although material witness warrants are not at issue in this case, the conduct of Goodwin in the past clearly supports the defendants' contentions regarding prosecutorial misconduct in the present motion. For example, I have reason to believe that Guy Goodwin had knowledge of the arrest of Leslie Bacon pursuant to the material witness warrant described in *Bacon v. United States*, 449 F.2d 933 (9th Cir. 1971). A material witness warrant was issued for Leslie Bacon in Seattle. Ms. Bacon was arrested in Washington, D.C. pursuant to the warrant, held in custody for at least three days and transported from Washington, D.C. to Seattle to testify before the Grand Jury. The Ninth Circuit Court of Appeals held that the material witness warrant was invalid as it was not based on probable cause. I believe that Goodwin had knowledge about or was invovled in the above-described conduct due to his involvement in the federal grand jury investigation in Seattle at that time. Mr. Goodwin appears as attorney of record for the government in two other Ninth Circuit cases involving Ms. Bacon. *See, Bacon v. United States*, 446 F.2d 667 (9th Cir. 1971) and *Bacon v. United States*, 466 F.2d 1196 (9th Cir. 1972). I also believe that Mr. Goodwin questioned Ms. Bacon when she testified before the federal grand jury in Seattle. Goodwin also stated he was in charge of the investigation of Ms. Bacon.

The court points out that defendants' Exhibit T is a two-page excerpt from Representation of Witnesses Before Federal Grand Juries (3d Ed. 1985) prepared by The Grand Jury Project, Inc. of the National Lawyers Guild. Page 12-21 of Exhibit T contains to reference to Goodwin. Page 12-22 contains a quote ostensibly made by Goodwin. In connection with Nolan's reference to Exhibit T, the court thoroughly agrees with the United States

that excerpts from articles are scarcely relevant, much less probative. Moreover, the Ninth Circuit decisions in *Bacon v. United States* do not deal with prosecutorial misconduct even if it is assumed that Goodwin was invovled in the events described therein.

The court has no intention of disclosing two years worth of Grand Jury transcripts based on this showing of possible prosecutorial misconduct occurring more than ten years ago, if at all. The court is persuaded that *McClintock* and *Sears, Roebuck & Co., Inc.* are referring to prior instances of prosecutorial misconduct which have already been proved prior to instances alleged to have occurred in the particular matter before the district court. To hold otherwise would embroil the court in litigating matters which may or may not have happened and which would be of doubtful relevance to the resolution of prosecutorial misconduct to the matter before the court.

G. *Derogatory References to Synanon Lifestyle.*

Defendants assert a need to review the Grand Jury transcripts to determine the extent to which the proceedings were tainted by irrelevant inquiries into Synanon's lifestyle, religious beliefs and practices, and for any statements that cast Synanon and its members in a false and discriminatory light. They assert that such statements could include calling Synanon a cult or a subversive or communistic organization. Defendants further assert that such remarks or inquiries would be violative of defendants' First Amendment rights of freedom of religion, association and expression and were designed to expose the defendants to bias. In asserting that this occurred in the Grand Jury proceedings, defendants point to paragraph 2 of Count One of the Indictment.

> 2. It was part of the conspiracy that the defendants and unindicted co-conspirators who were and are

> officials, attorneys and residents of The Synanon Foundation, Inc., later known as The Synanon Church, a corporation incorporated under the laws of the State of California as a nonprofit charitable corporation, sought to conceal and cover-up from agents of state agencies, from the Internal Revenue Service of the U.S. Treasury Department investigating whether the tax-exampt status of The Synanon Foundation, Inc., should be revoked, and from litigants in lawsuits in the courts of the State of California, the District of Columbia, and the courts of the United States in the District of Columbia, conduct and evidence and discussions thereof by Synanon officials, attorneys and residents which was contrary to Synanon's status as a charitable, non-violent, non-profit foundation, to wit, the inflicting of physical violence by Synanon residents on Synanon's enemies, the acquisition of an arsenal of guns, the 'Holy War', the diversion of Synanon money into private hands, salaries, bonuses, Synanon 'Love Matches,' 'Changing Partners' and other activity harmful to Synanon's status as a charitable, non-profit, non-violent foundation.

Defendants further refer the court to pages 20-21 of Judge Oberdorfer's Memorandum opinion granting defendants' motion to transfer venue of this action:

> Moreover, the government's argument as to the irrelevance of the documents destruction in California and the nature of Synanon's activities must also be discounted. In this motion proceeding, the government has made significant reference to colorful evidence of Synanon's acts of violence, obstruction of justice and other aberrational behavior. Indeed, the government's opposition is supported by a 140-page statement of material facts filed in *The Synanon Church v. United States*, C.A. No. 82-2303 (D.D.C.), That statement chronicles a notorious history of

Synanon.[11] The temptation upon the prosecution to bring this colorful evidence before the jury in this case will be very powerful. If the defendants have any rebuttal to this kind of evidence, should it become admissible, they are entitled to be prepared for it. The witnesses who would testify for the defense with respect to such matters appear to be largely from California.

---

[10] Nor should the government's concern about witness intimidation be countenanced, particularly as it may be intended to justify a trial in Washington instead of California. The United States and the Court must assume that its FBI and IRS agents can be protected anywhere in the United States. Nor does the government's concern about possible intimidation of jurors justify a 3,000 mile change of venue.

[11] The statement of Material Facts asserts with considerable supporting detail that:

> Synanon III, which commenced in 1974, involved the transformation of Synanon into a corporate conglomerate in business to make hugh profits for the personal enrichment of Dederich, his family and other members of the Synanon elite. Synanon was also to become a militaristic cult dedicated to violence. It declared 'Holy War' on the 'ungodly,' and threatened, harassed and beat perceived 'enemies.' Synanon recognized that it was no longer a charitable organization, so it started to call itself a religion in the hope of preserving its tax exempt status.

The Synanon Church v. United States, supra. Defendants' Statement of Material Facts Filed in Accordance with Local Rule 1-9(h) at 2.

Finally, defendants refer to the Declaration of Yvette Van Dalsem, quoted *supra*, that "[w]hile testifying before the Grand Jury, I was asked questions about my former husband and my Synanon Love Match, a religious marriage ceremony."

In connection with the assertion that the claimed remarks and inquiries were violative of defendants' First Amendment rights, the court makes some general observations. There is no question that a Grand Jury wit-

ness does not lose the right to refuse to answer a question of that to do so would violate his First Amendment rights and that the decision whether the witness can be compelled to answer requires balancing the relevancy of the question to the Grand Jury's investigation with the First Amendment right claimed. *Bursey v. United States*, 466 F.2d 1059, 1081-1088 (9th Cir. 1972); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also Ealy v. Littlejohn*, 589 F.2d 219, 226-230 (5th Cir. 1978). However, as a general rule, invocation of constitutional protections is personal and, if not invoked, waived. Defendants have not addressed this aspect of the problem nor have they referred the court to a decision holding it prosecutorial misconduct to ask questions to which a First Amendment claim might be raised or might be raised but was not.

With regard to the contention that a prosecutor may not ask questions designed solely to raise bias against the defendants, this is correct. However, it appears from the indictment and from *The Synanon Church v. United States* and *Synanon Foundation, Inc. v. Bernstein* that questions concerning Synanon's "lifestyle" were extremely relevant to the investigation. The court does not read anything into Judge Oberdorfer's comments and does not give any weight to a single question of one witness which, when compared to the Indictment, does not appear irrelevant.

H. *Prosecutor Assertions that Synanon was a RICO.*

Defendants assert that they need to review the Grand Jury transcripts to determine the extent to which the proceedings were tainted by Goodwin's assertions that Synanon was a RICO, and to determine if Goodwin presented exculpatory evidence showing that Synanon was not a RICO. It is not denied, by the United States, as it could not be that the Grand Jury was investigating liability under RICO. *See* Dfts. Ex. R. and Declaration of Thomas J. Nolan. The basis for the asserted prosecutorial misconduct is defendants' Exhibit S, which is a

telex dated December 22, 1982 from the Director of the FBI to the offices of the FBI in Sacramento, Los Angeles, New York, Phoenix and Las Vegas. Exhibit S was in reply to a telex dated December 21, 1982. Exhibit S states in pertinent part:

> TITLE CHANGED FROM UNSUBS: SYNANON FOUNDATION: POSSIBLE RICO: 00: SC. REFERENCED TEL SUGGESTS INVESTIGATION OF UNKNOWN SUBJECTS AND THE SYNANON FOUNDATION FOR POSSIBLE RICO VIOLATIONS UNDER THE 1838 CLASSIFICATION. A REVIEW OF REFERENCED COMMUNICATION BY THE ORGANIZED CRIME SECION [sic] [OCS], CRIMINAL INVESTIGATIVE DIVISION [CID], DOES NOT SUPPORT THE INVESTIGATION OF SYNANON AS A NON-LCN OC GROUP AT THE PRESENT TIME AND TITLE IS CHANGED TO REFLECT NEW CHARACTER AND CLASSIFICATION OF INVESTIGATION.
>
> REFERENCED TEL DOES SUGGEST HOWEVER THE POSSIBLE INVOLVEMENT OF SOME UNKNOWN MEMBERS OF SYNANON IN POSSIBLE EXTORTIONATE ACTS AND/OR POSSIBLE LOCAL CRIMES OF VIOLENCE AS WELL AS FEDERAL TAX VIOLATIONS. BASED ON THESE FACTS AND SACRAMENTO'S DESIRE TO CONDUCT LIMITED INVESTIGATION, FBIHQ AUTHORIZES INVESTIGATION REQUESTED OR CONDUCTED IN THIS MATTER BE LIMITED TO A PRELIMINARY INQUIRY IN ACCORDANCE WITH THE ATTORNEY GENERAL'S GUIDELINES ON CRIMINAL INVESTIGATIONS OF INDIVIDUALS AND ORGANIZATIONS. OCS, CID, IN CONJUNCTION WITH PERSONAL CRIMES UNIT, CID, CONCUR THAT ANY PRELIMINARY INQUIRY SHOULD FOCUS ON IDENTIFICATION OF INDIVIDUALS WHO ARE INVOLVED IN SPECIFIC CRIMINAL ACTS AND NOT ON

> THE SYNANON FOUNDATION AS AN OC GROUP. ACCORDINGLY FUTURE COMMUNICATIONS IN THIS MATTER SHOULD BE DIRECTED TO THE ATTENTION OF THE PERSONAL CRIMES UNIT, CID.

As the United States points out, Exhibit S is qualified by the phrase "at the present time." The United States contends:

> Federal authorities first became aware of this case when Bette Fleishman and George Farnsworth revealed the information contained in their declaration in mid-1983. The subsequent federal investigation which resulted in the return of this indictment considered the possible RICO violations. There is therefore no support for the defendants' purely speculative claim of grand jury abuse from the FBI memorandum concluding an earlier investigation which did not consider evidence subsequently learned in the present case.

The court agrees with the United States that it is the duty of the federal prosecutor to advise the Grand Jury of all possible federal criminal statutes applicable to their investigation, and no impropriety can be inferred from that fact alone. The court also agrees that the assertion that the Grand Jury proceedings were somehow tainted by the RICO investigations is without any foundation since the Grand Jury did not in fact indict for RICO violations. Defendants' argument is, in the court's opinion, the purest speculation: "The mere fact that no indictment for RICO resulted does not mean there was no prejudice. If the Grand Jury had not been tainted with the serious allegation that RICO violations imply, it might not have indicted. Only by reviewing the transcript can we measure the effect of the unfounded RICO allegations on the Grand Jury."

As defendants point out in their reply brief, Title 9, Chapter 9-110.320-.321 of the United States Attorneys' Manual (3-9-84) provides):

> 9-110.320 *Approval of Organized Crime and Racketeering Section Necessary*
>
> No criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Racketeering Section, Criminal Division.
>
> 9-110.321 Commentary
>
> It is the purpose of these guidelines to centralize the RICO review and policy implementation functions in the section of the Criminal Division having supervisory responsibility for this statute. A RICO prosecutive memorandum and draft indictment, felony information, civil complaint, or civil investigative demand shall be forwarded to the Organized Crime and Racketeering Section, Criminal Division, Box 571, Ben Franklin Station, Washington, D.C. 20044, at least 15-working days prior to the anticipated date of the proposed filing or the seeking of an indictment from the grand jury. It is essential to the careful review which these factually and legally complex cases require that the attorney handling the case in the field not wait to submit the case until the grand jury or the statute of limitations is about to expire, as authorizations based on oral presentations will not be given.
>
> These guidelines do not limit the authority of the Federal Bureau of Investigation to conduct investigations of suspected violation of RICO. The authority to conduct such investigations is governed by the FBI Guidelines on the Investigation of General Crimes. However, the factors identified here are the

> sole criteria by which the Department of Justice will determine whether to approve the indictment, felony information, civil complaint, or civil investigative demand. As in the past, the fact that an investigation was authorized, or that substantial resources were committed to it, will not influence the Department in determining whether an indictment under the RICO statute is appropriate. *Prior authorization from the Criminal Division to conduct a grand jury investigation based upon possible violations of 18 U.S.C. § 1962 is not required.* [emphasis added]
>
> In addition to the above considerations, the use of RICO in a prosecution is also governed by the *Principles of Federal Prosecution* (July 1980). Inclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the *Principles of Federal Prosecution.*

Defendants assert, by reference to a letter from Paul Coffee, Deputy Chief of the Organized Crime and Racketeering Section, to Benjamin's attorney, Mr. Luskin, that Goodwin did not seek approval for an indictment. they argue that "[i]t is even possible that Mr. Goodwin may have asked the Grand Jury not to indict on any alleged RICO counts, because he did not have the authority ever to bring a RICO indictment." However, as the court has emphasized, prior approval for a Grand Jury investigation is not required. Accordingly, the court finds this argument speculative and without merit.

ACCORDINGLY, IT IS ORDERED that defendants' Motion for Disclosure of Grand Jury Transcripts and Minutes is denied except as provided herein. IT IS FURTHER ORDERED that plaintiff shall provide to the court *in camera* the Grand Jury transcripts ordered

to be produced herein within thirty (30) days of the filing date of this order.

DATED: April 30, 1986.

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

Supreme Court, U.S.
FILED
APR 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1290

In the Supreme Court of the United States

OCTOBER TERM, 1988

DAVID R. BENJAMIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under the Court's decision in *Midland Asphalt Corp.* v. *United States*, No. 87-1905 (Mar. 28, 1989), the court of appeals had jurisdiction over petitioners' interlocutory appeals from orders denying their motions to dismiss the indictment because of alleged violations of Fed. R. Crim. P. 6(e) and alleged prosecutorial misconduct before the grand jury.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 852 F.2d 413. The order of the panel denying rehearing (Pet. App. 21a-22a) is unreported. The opinions of the court of appeals denying the government's motions to dismiss the appeals (Pet. App. 23a-55a) are reported at 825 F.2d 1317 and 812 F.2d 548. The orders of the district court denying petitioners' motions to dismiss the indictment (Pet. App. 56a-110a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1988. A petition for rehearing was denied on December 19, 1988. Pet. App. 21a-22a. The petition for a

writ of certiorari was filed on February 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek further review of the court of appeals' decision, in two consolidated pretrial appeals, affirming orders denying motions to dismiss the indictment on account of alleged violations of Fed. R. Crim. P. 6(e) and alleged prosecutorial misconduct before the grand jury.

1. Petitioners were indicted on October 1, 1985, in the United States District Court for the District of Columbia. They were charged with conspiring to defraud the United States and to obstruct justice, in violation of 18 U.S.C. 371 (Count 1); concealing material facts before an agency of the United States, in violation of 18 U.S.C. 1001 (Count 2); obstructing proceedings before an agency of the United States, in violation of 18 U.S.C. 1505 (Count 3); obstructing justice, in violation of 18 U.S.C. 1503 (Counts 4-7); and perjury, in violation of D.C. Code Ann. §§ 22-2501 (1981) and 22-2511 (Supp. 1988) (Counts 8-22). Pursuant to Fed. R. Crim. P. 21(b), the case was transferred at petitioners' request to the Eastern District of California. See *United States* v. *Benjamin*, 623 F. Supp. 1204 (D.D.C. 1985).

Petitioners filed motions to dismiss the indictment on the basis of (i) alleged violations of Fed. R. Crim. P. 6(e) and (ii) alleged prosecutorial misconduct in connection with the grand jury investigation. The district court denied those motions. Pet. App. 95a-110a (Rule 6(e)); Pet. App. 56a-94a (prosecutorial misconduct).

2. Petitioners filed notices of appeals from the orders denying their motions to dismiss, accompanied by :ondi-

tional petitions for writs of mandamus.[1] A motions panel of the court of appeals held that the district court's orders denying petitioners' motions to dismiss were appealable collateral orders. *United States* v. *Benjamin*, 812 F.2d 584 (9th Cir. 1987) (Pet. App. 38a-55a) (Rule 6(e) order); *United States* v. *Dederich*, 825 F.2d 1317 (9th Cir. 1987) (Pet. App. 24a-37a) (prosecutorial misconduct order).[2] In each instance, the panel concluded that *United States* v. *Mechanik*, 475 U.S. 66 (1986), would preclude review of the merits of petitioners' claims after a judgment of conviction, and the panel therefore deemed those claims "effectively unreviewable on appeal from a final judgment" for purpose of the collateral order doctrine. Pet. App. 28a-30a, 45a-49a.

The appeals were consolidated for purposes of the merits. The merits panel affirmed the district court's orders denying the motions to dismiss the indictment (Pet. App. 1a-20a).[3]

ARGUMENT

In *Midland Asphalt Corp.* v. *United States*, No. 87-1905 (Mar. 28, 1989), this Court held that an order denying a

---

[1] Petitioner Schiff was not a party to the appeal from the denial of the motion to dismiss on grounds of prosecutorial misconduct. See Pet. 8 n.4.

[2] In addition, in *Dederich* the motions panel held that an order denying a motion to dismiss by petitioners Dederich and Missakian based on transactional immunity granted by a state court was not immediately appealable. Pet. App. 30a-32a. The panel also denied these petitioners' conditional petitions for writs of mandamus with respect to that order. The correctness of those rulings is not raised in the petition for a writ of certiorari.

[3] The court of appeals has granted a stay of petitioners' trial pending the disposition of their petition for a writ of certiorari.

motion to dismiss an indictment for an alleged violation of Fed. R. Crim. P. 6(e) is not immediately appealable under the collateral order doctrine. Slip op. 5-6. The Court thereby resolved a conflict on that question between the Second Circuit's decision in *Midland Asphalt* and the Ninth Circuit's decision in *United States* v. *Benjamin*, which was the case permitting petitioners to appeal immediately from the denial of their Rule 6(e) motion.

The Court in *Midland Asphalt* found that, whether or not *Mechanik* would apply to appeals from judgments of conviction that raised alleged violations of Rule 6(e), pretrial orders denying motions to dismiss based on asserted violations of the Rule could not satisfy all three elements of the collateral order doctrine. If *Mechanik* would not apply, the Court explained, those orders would not be " 'effectively unreviewable on appeal from a final judgment.' " Slip op. 6 (quoting *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978)). On the other hand, if *Mechanik* would be controlling in appeals from judgments of conviction (as the Ninth Circuit found in this case), orders denying motions to dismiss on the basis of Rule 6(e) could not be said to " 'resolve an important issue completely separate from the merits of the action.' " *Ibid.*

Midland Asphalt requires dismissal of both appeals that are the subject of the petition in this case. The holding in *Midland Asphalt* is directly applicable to petitioners' appeal from the denial of their motions to dismiss based upon Rule 6(e) (No. 86-1337). The rationale of *Midland Asphalt* also controls petitioners' appeal from the denial of their motion to dismiss based on prosecutorial misconduct before the grand jury (No. 86-1388). The Ninth Circuit's decision upholding its jurisdiction over that appeal was based on the proposition, which *Midland Asphalt* rejected, that a claim of error that would be considered

harmless under *Mechanik*'s analysis is necessarily reviewable under the collateral order doctrine.

This Court's certiorari jurisdiction extends only to cases that are properly "in the courts of appeals." 28 U.S.C. 1254(1). Since the court of appeals lacked jurisdiction over these consolidated appeals, this Court would also lack jurisdiction to review its decision on the merits. See *United States* v. *Nixon*, 418 U.S. 683, 690-692 (1974); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742-743 (1982). Accordingly, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further proceedings in accordance with *Midland Asphalt*.[4]

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further proceedings in accordance with *Midland Asphalt Corp.* v. *United States, supra.*

Respectfully submitted.

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APRIL 1989

[4] As was noted above, petitioners' notices of appeal were accompanied by conditional petitions for mandamus. Although we believe that review by way of mandamus is unavailable in this case, that question should be addressed in the first instance in the court of appeals.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00188

Supreme Court, U.S.
FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondent limits its brief in opposition to the petition for certiorari to a single issue unrelated to the questions presented by Petitioners. It urges this Court to construe broadly its recent decision in *Midland Asphalt Corp. v. United States*, 57 U.S.L.W. 4386 (March 28, 1989), to preclude interlocutory review of *all* claims concerning irregularities before the grand jury, and not simply those raising "[a]n isolated breach of the traditional secrecy requirements. . . ." 57 U.S.L.W. at 4389. Because Respondent contends that *Midland Asphalt* forecloses the

appeal on which this petition is based, it asks that the petition be granted, but requests that the judgment below be vacated and the cause remanded for further proceedings in accordance with *Midland Asphalt*.

Respondent's invitation to enlarge summarily the holding in *Midland Asphalt* is superficially appealing. On closer scrutiny, however, it cannot be squared with the plain language of *Midland Asphalt* itself or with the "positive and restrictive language" of the Grand Jury Clause of the Fifth Amendment, *Ex parte Bain*, 121 U.S. 1, 6 (1887). The question of whether the "right not to be tried" embodied in the Grand Jury Clause is invoked by deliberate prosecutorial misconduct designed to deceive the grand jury and undermine its neutrality is neither addressed nor resolved by the limited holding of *Midland Asphalt*. We concur with the Respondent that the petition should be granted; but we submit that this question, together with those raised by Petitioners, merits the full attention of the Court.

1. In *Midland Asphalt Corp. v. United States*, this Court held that motions to dismiss an indictment for alleged violations of Rule 6(e), Fed. R. Crim. P., are not appealable as collateral orders solely by virtue of whatever effect *United States v. Mechanik*, 475 U.S. 66 (1986), might have on the availability of post-conviction review of these claims. The Court reasoned that whether or not *Mechanik* affected post-trial review, claims under Rule 6(e) could not satisfy the requirements for an immediately appealable collateral order. "If *Mechanik* is not extended beyond violations of Rule 6(d) . . . it is obvious that they are not 'effectively unreviewable on appeal from a final judgment.'" 57 U.S.L.W. at 4388 (citation omitted). If, on the other hand, *Mechanik* does bar post-conviction review, then orders denying motions to dismiss "cannot be said 'to resolve an important issue completely separate from the merits of the action' . . . ." *Ibid.*

Were *Mechanik* the only basis on which a claim to immediate appellate review could be founded, Respondent would be correct in urging that *Midland Asphalt* disposes of the question of whether this Court could entertain jurisdiction on the merits. The Court made clear in *Midland Asphalt*, however, that the Grand Jury Clause of the Fifth Amendment itself affords a basis for interlocutory review. Like the rights conferred by the Double Jeopardy and Speech and Debate Clauses, the Court recognized that the Grand Jury Clause "does indeed confer a right not to be tried (in the pertinent sense)," 57 U.S.L.W. at 4389, and "that deprivation of the right not to be tried satisfies the *Coopers & Lybrand* requirement of being 'effectively unreviewable on appeal from a final judgment.'" *Id.* at 4388 (citations omitted).[1]

Left largely unexplored in *Midland Asphalt*, and wholly ignored by Respondent, are the parameters of that right. On the one hand, the Court left no doubt that "the lack of a grand jury indictment itself, gives rise to a right not to be tried." 57 U.S.L.W. at 4389. And it acknowledged that "[u]ndoubtedly the common-law protections traditionally associated with the grand jury attach to the grand jury required by" the Grand Jury Clause. *Ibid.* At the same time, the Court stressed that not "every violation of those protections" triggers the "right not to be tried." *Ibid.* In particular, the Court held that "[a]n isolated breach of the traditional secrecy requirements does not" implicate the fundamental rights protected by the Grand Jury Clause. *Ibid.*

Having identified the shoals, however, the Court left the channel essentially uncharted, except to note that "[o]nly a defect so fundamental that it causes the grand

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[1] The Grand Jury Clause reads in relevant part as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury." U.S. Const., Amdt. 5.

jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried." *Ibid.* Both history and common sense dictate that the deliberate prosecutorial misconduct that the court of appeals found in this case is just such a "fundamental" defect, which squarely implicates the "right not to be tried."

As this Court has emphasized on many occasions, the Constitution requires a charging document not simply in the form of an indictment, but one "returned by a legally constituted nonbiased grand jury." *Lawn v. United States*, 355 U.S. 339, 349 (1958); *Costello v. United States*, 350 U.S. 359, 363 (1956) (Fifth Amendment requires "indictment returned by a legally constituted and unbiased grand jury"). Although "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," *Costello v. United States, supra*, 350 U.S. at 362, the right to a neutral, independent, and unbiased grand jury has strong historic underpinnings. "[I]n this country as in England of old the grand jury has convened as body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor." *Ibid.* Indeed, the Court has said that "[t]he very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. United States*, 361 U.S. 212, 218 (1960).[2] Thus, while it is true that "[t]he

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[2] As the Court put it in *Ex parte Bain, supra*, 121 U.S. at 11, the grand jury was designed

> as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity.

Fifth Amendment requires no more" than a "legally constituted and unbiased grand jury," *Costello v. United States, supra*, 350 U.S. at 363, neither will it tolerate anything less.[3]

In this instance, the conduct of the prosecutor was aimed at the heart of the grand jury's neutrality and independence. The court of appeals concluded that the prosecutor deliberately insinuated into the grand jury process as a witness and "expert consultant," Pet. App. 41a, an individual, Richard Ofshe, who was in fact suing six of the nine defendants on the exact allegations that formed the basis for their indictment. It found "real merit" to the charges that the prosecutor engaged in deliberate misconduct by concealing Ofshe's conflict of interest from the district court and the grand jury. Pet. App. 20a. Rather than disclose Ofshe's private interests in the investigation to the court or to the grand jury, the government disingenuously described him to the court as a "PhD. who has devoted over ten years to the study of Synanon and who is knowledgeable about its records, tape recordings, and the identities and voices of officials . . . ." Pet. App. 134a. As a result, although Ofshe testified at least once, and perhaps "several times" before the grand jury, Pet. App. 40a n.2, and was given broad access to secret grand jury material in order to assist the government in its investigation, neither the grand jury nor the court authorizing the disclosure of grand jury materials was ever made aware of the fact that he was seeking civil damages from the defendants for the "exact allegations that form the basis for the later indictment against defendants." Pet. App. 40a; *see also id.* at 3a.

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[3] There is precedent for treating fundamental defects in an indictment as the functional and legal equivalent of no indictment at all. Thus, this Court "had no difficulty in holding" in *Ex parte Bain, supra*, that an indictment that was improperly amended "was no indictment of a grand jury." 121 U.S. at 13.

This is not, in short, a disguised effort to challenge the sufficiency of the evidence before the grand jury, *see Costello v. United States*, *supra*, nor does it concern "[a]n isolated breach of the traditional secrecy requirements," *Midland Asphalt Corp. v. United States*, *supra*, 57 U.S.L.W. at 4389, with little, if any potential impact on the grand jury's independence or neutrality.[4] Rather, our claims are centered upon allegations that, through the connivance of the prosecutor, the charges in this case were the product of "private enmity," a result that the grand jury was specifically intended to prevent. *Ex parte Bain*, *supra*, 121 U.S. at 11. It is in precisely this setting that the grand jury "is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions." *Id.* at 12 (internal quotations omitted). While the Court in *Midland Asphalt* is surely correct that not "every violation of [the common-law] protections" associated with the grand jury "gives rise to a right not to be tried," 57 U.S.L.W. at 4389, it is hard to imagine what is left of those protections if the grand jury's neutrality and independence can be subverted without invoking the right.

Limiting the right not to be tried arising from the Grand Jury Clause to "the lack of a grand jury indictment itself," *Midland Asphalt Corp. v. United States*, *supra*, 57 U.S.L.W. at 4389, has the virtue of simplicity.

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[4] As the court of appeals noted in *Midland Asphalt*, the risk of harm from the 6(e) violation there was largely limited to its potential effect on the petit jury, and posed little likelihood of prejudicing the grand jury that indicted the defendants. *United States v. Midland Asphalt Corp.*, 840 F.2d 1040, 1046 (2d Cir. 1988). By contrast, although one of the aspects of the prosecutorial misconduct in this case has been denominated a violation of Rule 6(e), Fed. R. Crim. P., the factual setting is entirely different. Our claim is that the government deliberately and deceitfully used the improper 6(e) disclosure in order to insinuate Ofshe into the grand jury process, with great potential impact on the grand jury's independence, even though he had no semblance or obligation of impartiality.

But there is nothing else to recommend it. Just as there is no historic basis for distinguishing between charges brought without an indictment from those returned by a grand jury that is biased or improperly constituted, neither is there any principled or even pragmatic basis for such a distinction. An individual could be brought to trial in the absence of an indictment only through the deliberate misconduct of a prosecutor seeking to circumvent the grand jury's independent scrutiny. As this Court made clear in *Midland Asphalt*, a defendant facing trial in such a circumstance would surely have the right to interlocutory appellate review of his claim that the prosecutor's conduct deprived him of rights explicitly guaranteed by the Fifth Amendment. There is no logical reason to deny interlocutory review to a defendant where a prosecutor employs different means to accomplish the same purpose with the identical effect.

Precisely because the right to indictment can be subverted by stealth as well as by direct assault, Justice Burton, concurring in *Costello*, cautioned against too broad an interpretation of the Court's declarations in that case. "I assume," he explained, "that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment." 350 U.S. at 364. "To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value of the private citizen." *Ibid.*

2. We are alert to the pragmatic concerns that have consistently informed the Court's decisions concerning the collateral order doctrine, and that underlie "the utmost strictness" with which the exception has been applied in criminal cases. *Flanagan v. United States*, 465 U.S. 259, 265 (1984). Interlocutory review of claims of deliberate and prejudicial prosecutorial misconduct before the grand jury, however, is unlikely to interfere with the grand jury's independence or with society's interest in the

speedy disposition of criminal cases. Like the double jeopardy issues addressed in *Abney v. United States*, 431 U.S. 651 (1977), claims of prejudicial prosecutorial misconduct are not available in every case; to the contrary, the requirement that a criminal defendant present a colorable showing of misconduct affecting the grand jury's neutrality and independence warranting dismissal under *Bank of Nova Scotia v. United States*, 108 S. Ct. 2369 (1988), "inherently limits the availability of the claim." *United States v. MacDonald*, 435 U.S. 850, 862 (1978). And unlike challenges to the sufficiency or admissibility of evidence relied upon by the grand jury, *see United States v. Calandra*, 414 U.S. 338 (1974); *Costello v. United States*, *supra*, appellate review will safeguard the grand jury's traditional independence, not undermine it.[5]

Just as important, the undoubted costs of interlocutory appellate review cannot be assessed apart from the interests it is intended to protect. As this Court long ago recognized, "the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed." *Ex parte Bain*, *supra*, 121 U.S. at 10. Important claims founded upon explicit constitutional guarantees merit meaningful review. The result that we urge does nothing more than to accommodate this fundamental principle to the accepted rules governing final judgments.

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[5] Moreover, as this Court has observed on more than one occasion in the face of government admonitions of chaos in the criminal justice system, where interlocutory review is called for under the collateral order doctrine, efficient means may be found to expedite such appeals and to weed out groundless claims. *Richardson v. United States*, 468 U.S. 317, 322 (1984); *Abney v. United States*, *supra*, 431 U.S. at 662 n.8.

CONCLUSION

We concur with the Respondent that a writ of certiorari should be granted. Because the important issues raised by both Petitioners and Respondent are only touched upon in *Midland Asphalt*, however, the court of appeals lacks sufficient guidance to address them without further and full attention from this Court.

Respectfully submitted,

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